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142-492?

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 244.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF WASHINGTON EX RELATIONE HIRAM DUSTIN, PROSECUTING ATTORNEY IN AND FOR THE COUNTIES OF YAKIMA, KITTITASS, KLIKITAT, CLARKE, AND SKAMANIA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED OCTOBER 17, 1887.

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a TERRITORY OF WASHINGTON *ex Rel.* HIRAM DUSTIN, &c., &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Transcript.

Received and filed Jun- 22, 1886.

R. G. O'BRIEN, *Clerk.*

1 TERRITORY OF WASHINGTON, } ss:
Fourth Judicial District,

In the District Court of the Fourth Judicial District, Holding Terms at North Yakima.

THE TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Esq., Prosecuting Attorney for the Counties Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of Motion for Mandamus.

To the Northern Pacific Railroad Company:

You are hereby notified that at one o'clock p. m., on the 2nd day of March, A. D. 1885, or as soon thereafter as counsel can be heard, an affidavit and motion, copies of which are served herewith, will be presented to his honor George Turner, associate justice of the supreme court of Washington Territory and assigned to and
2 holding the courts in the fourth judicial district of said Territory, at his chambers, in Yakima city, Yakima county, Washington Territory, and at said time and place the undersigned will, upon the affidavit and motion then presented, move the court for writ of mandamas to compel the Northern Pacific Railroad Company to erect and maintain a depot at Yakima city, on the line of their railroad, and to compel said railroad company to stop its trains regularly at said Yakima city and to furnish proper freight and passenger facilities at said Yakima city for the public convenience.

H. DUSTIN,
Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington.

REAVIS & PRUYN, *Of Counsel.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

3 *Motion for Mandamus.*

In the Matter of an Application for a Writ of Mandamus. Motion

And now comes the Territory of Washington on the relation of Hiram Dustin, Esquire, prosecuting attorney for the counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, and upon the affidavit herewith presented and the proof of service of a copy of the same and a copy of this motion, and a notice of the time and place of hearing this motion, duly served upon the Northern Pacific Railroad Company, moves the court to grant a writ of mandamas commanding the Northern Pacific Railroad Company to erect and maintain a depot at Yakima city, and to stop its trains at Yakima city, and to give to Yakima city proper freight and passenger facilities.

H. DUSTIN,
Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washing., and
REAVIS & PRUYN,
Of Counsel.

4 *Affidavit of D. B. May.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

DAVID B. MAY, being first duly sworn, says that the Northern Pacific Railroad Company is a corporation organized under the laws of the United States and has constructed and is now operating a railroad through Yakima city, in said county and Territory, and is a common carrier of freight and passengers for hire, and passes through said Yakima city daily with its freight and passenger trains; that said Yakima city was incorporated by an act of the Legislature of Washington Territory approved by the Governor of said Territory on the 23d day of November, A. D. 1883; that said Yakima city has a population of more than six hundred inhabitants and is the county-seat of Yakima county, a county having a population of more than four thousand inhabitants; that there is no other business centre of any size or importance in said county; that a large and well-finished court-house is situated at said Yakima city; that regular terms of the
5 United States court and the district court of the fourth judicial district of Washington Territory *is* held at said court-house, in said Yakima city; that said court-house has a vault therein for the safe keeping of the records of the said county and has convenient offices, occupied by the officers of said county; that there is a United States land office located by act of Congress at Yakima city;

that there is a large public school building in said Yakima city, in which is kept a graded school, with an average attendance of over one-hundred and twenty-five scholars; that there are three large and well-constructed church edifices in Yakima city; that there is a national bank established and doing business in said Yakima city; that there is a post office at Yakima city, which is rated as fourth-class and paid the postmaster thereof the sum of $900 as compensation for the last year; that there is in said Yakima city a flouring mill, two hardware stores, three hotels, three general merchandise stores, one grocery store, two butcher shops, two harness and saddlery stores, one bakery, two milliner stores, one jewelry store, one notion store, one cigar and tobacco store, three
6 billiard saloons, two breweries, one steam planing mill, many fine residences, a large number of comfortable dwelling-houses, besides many other buildings; that many shade, fruit, and ornamental trees have been planted along the streets of said Yakima city and in the door-yards of said city, and a large irrigating ditch has been brought a great distance to water the same; that there are merchants in Yakima city doing business therein in almost every branch of business; that said line of railroad is the Cascade Branch of the Northern Pacific railroad, and leaves the Columbia river about six miles below the mouth of the Yakima river, and thence runs up the valley of the Yakima river, and is being constructed through the county of Yakima and will be built through Kittitass county, along the valley of the Yakima river, and thence over the Cascade Mountains to Puget Sound; that said Yakima city is the oldest town and business centre between the Columbia river and Puget Sound on the line of said Cascade Branch, and said Yakima city is the largest town and most important business centre on said Cascade Branch, except the town at the Puget Sound terminus thereof;
7 that it is the most important point for business in Washington Territory between the Cascade Mountains and the Columbia river; that Yakima city was laid out and settled in the year 1871 and has ever since that time been constantly and permanently growing; that said Yakima city is most conveniently situated as a centre of trade and business for a very large section of country, and has been made very beautiful and attractive by care and skill and the expenditure of much money and labor; that said Northern Pacific Railroad Company has not constructed any side track nor any station nor any freight and passenger depot at said Yakima city; that said Norther- Pacific Railroad Company does not stop its passenger and freight trains at said Yakima city and will not receive nor deliver passengers and freight at said Yakima city; that a demand has been made upon said railroad company to stop its freight and passenger trains at Yakima city and a demand has been made upon said railroad company to build a freight and passenger depot and station and furnish to said Yakima city the
8 proper and necessary freight and passenger facilities that her importance as a business centre demands and as public convenience requires; that said railroad company has, through its president and chief officer, refused to give to said Yakima city any

such privileges, and neglects and refuses to erect and maintain a station or depot for freight and passengers and neglects and refuses to stop its passenger and freight trains and receive and deliver freight and passengers at said Yakima city as the convenience and necessities of the public require; that said railroad company have no legal right to discriminate and refuse to give to said Yakima city a freight and passenger depot and have no right to discriminate against said Yakima city and refuse to stop its freight and passenger trains thereat and refuse to receive and deliver passengers and freight at a convenient and proper place thereat; that said railroad company is compelled by law to furnish at Yakima city, in a convenient and proper place, a depot for freight and passengers and to stop its regular freight and passenger trains thereat and receive and deliver freight and passengers at said depot as public convenience may require; that
9 since said railroad was constructed and running its freight and passenger trains daily through said Yakima city and acting as a common carrier by rail of freight and passengers many persons have desired and requested to have freight delivered at Yakima city to them by said railroad company and have desired and requested to ship freight thereat, and many persons have desired and requested said railroad company to stop its passenger trains at Yakima city to allow them to get in and off said passenger trains, but said railroad company have refused and continually do refuse and neglect so to do; that said railroad company have laid off a town called "North Yakima," and filed a plat thereof on the 5th day of February, 1885, in the office of the auditor of Yakima county, Washington Territory; that said town of North Yakima is situated four miles north of Yakima city, on the line of said railroad; that said railroad company is erecting a freight and passenger depot at said North Yakima, and said railroad company compel all persons desirous of taking the trains, who live in or near
10 Yakima city, to go to said North Yakima, and compel all persons who desire to ship freight or receive freight to go to North Yakima to ship or receive the same; that said railroad company have the present ability to stop its freight and passenger trains at Yakima city, and have the present ability and the ability at any time to construct and maintain a freight and passenger depot at said Yakima city, and have at all times the ability to give proper and necessary freight and passenger facilities at Yakima city, on said railroad, for the accommodation of the public; that except at the town of "Prosser," at the falls of the Yakima river, which is a place of only about twelve houses, the said railroad company have built depots and put in side tracks at places where there was no settlement and no town or business centre and where the public would receive only slight convenience or benefit, and have neglected to give and refuse to give to Yakima city, the oldest, largest, and most important public and business centre for a distance of two hundred and forty miles on the line of its Cascade Branch, any freight and passenger facilities whatever, while granting and main-

taining such freight and passenger facilities to almost
11 wholly unimportant points for the public convenience, thus unjustly, improperly, and illegally discriminating against the public and private convenience of those living in and near Yakima city and the public generally; that said railroad company has laid out the said rival town of North Yakima and will, if not compelled to furnish freight and passenger facilities at said Yakima city, completely distroy half a million of dollars' worth of property, and that the people of Yakima county and the public will suffer great loss; that said company laid out said rival town on its own land, which had no improvements thereon, and is ruining the town of Yakima city for the purpose of enhancing the value of its new town site; that there is no other plain and adequate remedy to compel the said railroad company to perform its duty as common carrier through the city of Yakima than this proceeding; that public convenience requires that said railroad company be compelled to erect and maintain a freight and passenger depot at said Yakima city and stop its freight and passenger trains thereat; that said railroad is unjustly discriminating against the rights
12 and interests of the public by refusing and neglecting to maintain a depot and stop its trains at said Yakima city; that the common counsel of the city of Yakima passed an ordinance that all railroad companies running trains through the corporate limits of the city of Yakima shall stop their trains at a convenient place regularly to receive and deliver freight and passengers; that said ordinance has not been complied with by the Northern Pacific Railroad Company.

DAVID B. MAY.

Subscribed in my presence and sworn to before me by David B. May this 11th day of February, A. D. 1885.

EDWARD PRUYN,
[SEAL.] *Notary Public in and for Washington Territory, Residing at Yakima City.*

(Endorsement:) Service of the within application accepted Feb. 16th, 1885. James McNaught, attorney for the Northern Pacific R. R. Co.

13 In the matter of an application for a writ of mandamus. Filed Feb. 20th, 1885.

KATE W. FENERBACK, *Clerk.*

14 *Return and Answer of N. P. R. R.*

TERRITORY OF WASHINGTON, }
County of Yakima. }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

In the Matter of an Application for a Writ of Mandamus.

Now comes the Northern Pacific Railroad Company and for return and answer to the application of Hiram Dustin, prosecuting attorney for the counties of Klikitat, Yakima, Kittitass, Clarke, and Skamania, says:

1st. The said Northern Pacific Railroad Company denies that it has completed its railroad through the incorporated limits of Yakima city, and avers that it has partially constructed its railroad from Pasco junction, in Franklin county, to a point 3½ miles in a northwesterly direction from Yakima city, and that it is now finishing and completing said road, and that the whole of said road between said points is now in the hands of and managed by the contractors of the Northern Pacific Railroad Company and the construction department of said company.

15 The said respondent denies that it is running over said road and through the said Yakima city passenger and freight trains, but avers that it is running over said road construction trains, to which, for the accommodation of itself and the public, it attaches and transports freight and passenger cars and freight and passengers.

2nd. Said respondent denies that Yakima city has a population of more than 600 people, and denies that there is no other business centre of any size or importance in said county of Yakima.

3d. Said respondent admits that there is a national bank established and doing business in said Yakima city, but avers that said national bank, within a very short time, intends to remove from said Yakima city to North Yakima.

Said respondent admits that at the date of said application there were 3 hotels in said Yakima city, but avers that one of said hotels has since been removed to said North Yakima.

Said respondent denies that there are three general merchandise stores in said Yakima city.

Said respondent further admits that at the date of its ap-
16 plication there were in Yakima city other business houses and residences, but not the number enumerated in the affidavit of David B. May, but avers that since said time that ¾ of the business men of Yakima city have made their arrangements to acquire business and residence property in North Yakima and intend to remove from said Yakima city to said North Yakima, and said respondent denies that said Yakima city is the most important business point or centre along said Cascade Branch of said road except the town at Puget Sound terminus thereof, and avers that said North Yakima

is a better location for a town and business point than said Yakima city.

That there is now in said North Yakima 40 buildings, and that arrangements and contracts are now in force for the construction in said North Yakima within a very short time of 52 other buildings for business and residence, besides a station, 8-stall round-house, and repair shops.

Said respondent denies that said Yakima city is conveniently situated as a centre of trade and business for a large section of country, and denies that said respondent has discriminated or is now
17 discriminating against said Yakima city or the inhabitants thereof, but avers that said respondent in locating its station and depots has uniformly endeavored to so locate them as to accommodate to the best advantage itself and the greatest number of people and greatest amount of business.

That it has located its stations between Pasco and Yakima city, so that all people between said points have convenient railroad facilities.

That there are no people living within 4 miles south or east of said Yakima city; that from a point 4 miles below Yakima city and extending along down the east bank of the Yakima river are settlements, and that respondent has located stations on the line of its road so as best to accommodate said settlements.

That respondent's line of road from Yakima city northwest for a distance of 8 miles north is and will be located and constructed on the west side of Yakima river; that at said point, to wit, about 8 miles north of said Yakima city, said railroad, when constructed, will cross
18 said Yakima river to the east side thereof; that there are not people and business sufficient between and including said Yakima city and said point to warrant and justify the respondent in constructing and maintaining more than one station and depot, and that when said respondent's road is fully completed all the people of the Wenas, Natches, Cowiche, Upper Attanum, Moxee, and Yakima city will necessarily be supplied with and furnished railroad facilities by and through one station, and that a station and depot at North Yakima will better accommodate all of said people with railroad privileges and facilities than at any other point.

That there are now living in said Wenas, Natches, Cowiche, and Upper Attanum more than 5 times as many people as there are living in said Yakima city.

That there are stores and other places of business in said Wenas county.

That the people residing in said Wenas, Natches, Cowiche, and Upper Attanum are producers and are compelled to haul to market by teams the products of their farms, and that the expense will
19 be less and haul shorter for said people if said station is located at North Yakima.

That the taxable property of Yakima city, personal and real, as shown by the assessment-roll for the year 1884, is $319,787, and that the taxable property, as shown by the assessment-roll of *the* Wenas, Natches, Cowiche, and Upper Attanum is about $884,000, and that

in the assessment of said Yakima city respondent includes many farms.

That a map showing location of respondent's road, stations, Yakima city, and said Wenas, Natches, Cowiche, and Upper Attanum is hereunto annexed, marked Exhibit "A," and hereby made a part of this return.

4th. That said Yakima city on the 7th day of February, 1885, by and through its city counsel, duly passed an ordinance, No. 35, entitled "An act to regulate the speed and stopping of railroad engines and trains within the city of Yakima."

That sections 3 and 4 of said ordinance are in words following:

"SEC. 3. That all trains are required to stop at and opposite the extension of Court street, in Yakima city, where said extension of said street intersects the railroad."

20 "SEC. 4. That all trains are required to stop at said point referred to in said last section of this ordinance, and before crossing the extension of the line of said street in said last section referred to, for a reasonable time and allow passengers to get on and off the trains and receive and deliver freight."

That section five of said ordinance provides a penalty for each and every violation of said ordinance.

That to comply with said ordinance it would be necessary for respondent to build at said junction a station.

That the conduct and management of respondent's business requires that it erect and maintain at and adjacent to the station and depot mentioned in paragraph 3 of this return an eight-stall round-house, repair shops, side tracks, car yards, and switches, and that respondent cannot erect and maintain but one such station, round-house, shops, and yard at or near Yakima city and North Yakima; that the soil at and near the junction of said Court street and respondent's road is so permeated and filled with alkali and water as

21 is of such a nature that respondent cannot at said point erect and maintain said station or round-house, repair shops, or yard.

That respondent caused its road to be graded, track laid, and -lin-ed past said junction in December, 1884; that respondent has been running over said road ever since but few and light construction trains at a very slow rate of speed; that, notwithstanding that respondent has taken great care and caution in operating said portion of said road, on account of the said location respondent has been compelled to ali-ne said road four times.

Respondent further avers that it is informed and believes, and upon such information and belief says—

That at said point of intersection or junction, where it is now marshy or soft ground, was a few years ago dry and solid ground.

That the changed condition of said ground is caused by drainage from irrigating and other ditches, and that the ground to north and westward of said point is higher than at said point, and will in the future be irrigated to a greater extent than it is at the present time, and that increased irrigation will increase the amount of drainage

and surface water running over and through said land at
22 said point of junction and render it more difficult to maintain a station at said point.

That the ground at said North Yakima is 85 feet higher than it is at said junction of said railroad and said alleged Court street, and that at said North Yakima stations and other buildings can be erected and maintained for a reasonable expenditure of money, and they cannot be erected and maintained at said junction for a reasonable amount of money, and that there is not now and will not be in the future business at said Yakima city to warrant or justify the respondent in erecting and maintaining a station at said point, even if the land at said point would admit of so doing.

5th. That respondent's charter vests in it the right to select the places for and the time and manner of building its stations, with the exception that respondent cannot erect and maintain stations within the corporate limits of cities without permission, expressed or implied, and that respondent selected North Yakima as the place at which to erect and maintain stations instead of Yakima
23 city in pursuance of said discretion and for the reason that the interests of the railroad company and the people of Yakima county are and will be better served than by any other selection the respondent could have made.

That respondent is under no duty or obligation to furnish or attempt to furnish station and depot facilities at Yakima city, situated as it is, and is under no duty or obligation to stop its passenger or freight trains at said intersection of Court street and said railroad.

Respondent denies that it has been requested by any or many people to erect and maintain a station at Yakima city or stop its freight or passenger trains there.

6th. Said respondent denies that it is compelled or required by law or otherwise to furnish at Yakima city, in convenient or proper or other place a depot for freight and passengers or either or stop any of its trains thereat or to receive or deliver thereat freight or passengers.

Respondent avers that the citizens of Yakima city are far better accommodated and furnished with railroad facilities by the
24 location of said station and depot at North Yakima than are the people of Wenas, Couiche, Natches, and Upper Attanum.

7th. Respondent denies that it unjustly, improperly, or illegally discriminates against Yakima city, the public, or any citizen or citizens thereof, and denies that it will completely or at all destroy one-half million dollars' worth of property or any property, or that the people of Yakima county or the public will suffer great or any loss by any act of respondent.

And respondent denies that it laid out said town of North Yakima for the purpose of enhancing the value of its own property or for the purpose of injuring the property of any other person, persons, or city, but avers that in laying out said town and establishing there a station and other buildings it was acting and did act for the

best interests of the public and the respondent, and that it has left nothing undone that it ought to have done, required by its charter or law.

Wherefore respondent prays that it go hence without day and have judgment for its costs.

McNAUGHT, WHITSON & NAVARRE,
Attorneys for Northern Pacific Railroad Company.

25 TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

H. S. HUSON on oath says he is the agent of respondent; that he has heard read the foregoing return and answer and knows the contents thereof, and believes the same to be true.

H. S. HUSON,
Ass't Eng'r.

Subscribed and sworn to before me this 2nd day of March, 1885.

J. A. NAVARRE,
Notary Public.

(Endorsement:) In the matter of application of H. Dustin, Esq., for mandamus *vs.* Northern Pacific R. R. Co. Return. Filed March 2d, '85. Kate W. Fenerback, clerk, by R. Strobach, deputy.

26 *Affidavit of D. B. May.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

DAVID B. MAY, being first duly sworn, states that the Northern Pacific Railroad Company built its railroad and in the month of December, 1884, began running its trains thereon and carried freight and passengers thereon for hire to and from Yakima city, in said county and Territory; that from the time it so began to act in the capacity of common carrier by the construction of its line to said Yakima city until about the 25th day of January, A. D. 1885, said railroad company maintained a side track and a ticket and freight and telegraph office at said Yakima city; that during that time it received and delivered freight and passengers at said Yakima city; that while said railroad company was so maintaining a freight, telegraph, and passenger office at said Yakima city on the line of its road, and while it was receiving and delivering freight and passengers daily at said office at said Yakima city, three commissioners, appointed by the President of the United States, came over the line and examined
27 the same from near the Satas station to the 85th mile post north from the Columbia river, for the purpose of examining and reporting to the President whether or not 25 miles of said road so constructed between said Satas station and said 85th mile post was constructed, equipped, and maintained as a first-class road, as required by the act of Congress approved July 2d, 1862; that said

85th mile post is about one mile north of the point at Yakima city where said company were maintaining a freight, passenger, and telegraphing office and selling tickets and receiving and delivering freight and passengers at the time said commissioners passed over and examined said line; that after said commissioners had viewed said road and returned to their homes said railroad company took up said side track and discontinued said freight and telegraph office and passenger office at said Yakima city, and removed the same four miles north of Yakima city to a point on its own land where there was no settlement nor improvements, and refused thereafter to stop its trains at Yakima city and refused to deliver freight and
28 passengers thereat; that the United States mail was carried and delivered by said railroad company at its office at Yakima city during the time its freight and passenger office was maintained at Yakima city; that the tonnage of the freight traffic at Yakima city is and would be 3,000 tons annually, and more freight and passengers would be received and delivered at Yakima city if freight and passenger facilities were given to it by the Northern Pacific Railroad Company than any other point between the Columbia river and Puget Sound on the line of the Cascade Branch of said Northern Pacific railroad; that on the 7th day of February, A. D. 1885, the common counsel of the city of Yakima, an existing city, incorporated under the laws of Washington Territory, passed an ordinance entitled "An ordinance regulating the speed and stoppage of railroad trains within the city of Yakima," which said ordinance was duly approved by the mayor of said city & which said ordinance required all railroad trains running through the city of Yakima to stop regularly at a convenient place for the receiving and
29 delivery of freight and passengers; that it is necessary for the convenience of the public that a station be established at Yakima city by said railroad company on the line of its road, and that freight and passengers be delivered and received thereat; that the United States mail directed to Yakima city is carried through Yakima city and four miles north to the town of North Yakima and then brought back by a hack, making a delay of several hours in the delivery of said mails.

DAVID B. MAY.

Subscribed in my presence and sworn to before me by David B. May, at Yakima county, Washington Territory, this 2nd day of March, A. D. 1885.

EDWARD PRUYN,
Notary Public in and for Washington Territory.

(Endorsements:) Fourth district, county of Yakima. In matter of application for mandamus. Affidavit in support of motion. Filed March 2nd, 1885. Kate W. Fenerbach, clerk.

30 *Complaint.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

THE TERRITORY OF WASHINGTON on the Relation of Hiram Dustin, Esq., Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Complaint.

In the matter of an application for a writ of mandamus in pursuance of stipulation and order of court entered thereon March 2nd, 1885.

The said plaintiff complains and alleges—

That the Northern Pacific Railroad Company is a corporation organized under the laws of the United States, and has constructed and is now operating a railroad through Yakima city, in said county and Territory, and is a common carrier of freight and passengers for hire, and passes through said Yakima city daily

31 with its freight and passenger trains.

That said Yakima city was incorporated by an act of the Legislature of Washington Territory approved by the Governor of said Territory on the 23d day of November, A. D. 1883; that said Yakima city has a population of more than six hundred inhabitants and is the county-seat of Yakima county, a county having a population of more than four thousand inhabitants; that there is no other business centre of any size or importance in said county; that a large and well-furnished court-house is situated at said Yakima city; that regularly terms of the United States court and the district court of the fourth judicial district of Washington Territory are held at said court-house, in said Yakima city; that said court-house has a vault therein for the safe keeping of the records of the said county and has convenient offices occupied by the officers of said county; that there is a United States land office located by act of Congress at Yakima city.

That there is a large public school building in said Yakima city, in which is kept a graded school, with an average attendance

32 of over one hundred and twenty-five scholars; that there are three large and well constructed church edifices in Yakima city; that there is a national bank established and doing business in said Yakima city; that there is a post office at Yakima city, which is rated as fourth class and paid the postmaster thereof the sum of $900.00 as compensation for the last year; that there is in said Yakima city a flouring mill, two hardware stores, three hotels, three general merchandise stores, one grocery store, two butcher

shops, two harness and saddlery stores, one bakery, two milliner stores, one jewelry store, one notion store, one cigar and tobacco store, three billiard saloons, two breweries, one steam flouring mill, many fine residences, a large number of comfortable dwelling-houses, besides many other buildings; that many shade, fruit, and ornamental trees have been planted along the streets of said Yakima city and in the door-yards of said city, and a large irrigating ditch has been brought a great distance to water the same; that there are merchants in Yakima city doing business therein in almost every branch of business; that said line of railroad
33 is the Cascade Branch of the Northern Pacific railroad and leaves the Columbia river about six miles below the mouth of the Yakima river, and thence runs up the valley of the Yakima river, and is being constructed through the county of Yakima and will be built through Kittitass county, along the valley of the Yakima river, and thence over the Cascade Mountains to Puget Sound; that said Yakima city is the oldest town and business centre between the Columbia river and Puget Sound, on the line of said Cascade Branch, and said Yakima city is the largest town and most important business centre on said Cascade Branch except the town at Puget Sound terminus thereof; that it is the most important point for business in Washington Territory between the Cascade Mountains and the Columbia river.

That Yakima city was laid out and settled in the year 1871, and has ever since that time been constantly and permanently growing; that said Yakima city is most conveniently situated as a centre of trade and business for a very large section of country, and
34 has been made very beautiful and attractive by care and skill and the expenditure of much labor and money; that said Northern Pacific Railroad Company have not constructed any side tracks nor any station nor any freight and passenger depot at said Yakima city; that said Northern Pacific Railroad Company does not stop its passenger and freight trains at said Yakima city, and will not receive nor deliver passengers and freight at said Yakima city; that a demand has been made upon said railroad company to stop its freight and passenger trains at Yakima city, and a demand has been made upon said railroad company to build a freight and passenger depot and station and to give and furnish to said Yakima city the proper and necessary freight and passenger facilities that her importance as a business centre demands and as public convenience requires; that said railroad company has, through its president and chief officer, refused to give to said Yakima city any such privileges, and neglects and refuses to erect and maintain a station or depot for freight and passengers, and neglects and refuses to stop its passenger and freight trains and receive and deliver freight and passengers at said Yakima city as the
35 convenience and necessities of the public require; that said railroad company have no legal right to discriminate against said Yakima city and refuse to stop its freight and passenger trains thereat and refuse to receive and deliver passengers and freight at a con-

This — 21st line on page 5 of original complaint.

venient and proper place thereat; that said railroad company is compelled by law to furnish at Yakima city, in a convenient and proper place, a "depot for freight and passengers and to stop its regular freight and passenger trains thereat and receive and deliver freight and passengers at said depot as public convenience may require;" that since said railroad was constructed and running its freight and passenger trains daily through said Yakima city and acting as a common carrier by rail of freight and passengers many persons have desired and requested to have freight delivered at Yakima city to them by said railroad company and have desired and requested to ship freight thereat, and many persons have desired and requested said railroad company to stop its passenger trains at Yakima city to allow them to get on and off said passenger trains, but said railroad company have refused and continually do refuse and neglect so to do;

This is 28th line on page 5 of original complaint.

This is line 4 of page 6 of original complaint.

36 that said railroad company have laid off a town called "North Yakima" and filed a plat thereof, on the 5th day of February, 1885, in the office of the auditor of Yakima county, Washington Territory; that said town of "North Yakima" is situated four miles north of Yakima city, on the line of said railroad; that said railroad company is erecting a freight and passenger depot at said North Yakima and said railroad company compel all persons desirous of taking its trains who live in or near Yakima city to go to said North Yakima and compel all persons who desire to ship freight or receive freight to go to North Yakima to ship or receive the same; that said railroad company have the present ability to stop its freight and passenger trains at Yakima city, and have the present ability and the ability at any time to construct and maintain a freight and passenger depot at said Yakima city, and have at all times the ability to give proper and necessary freight and passenger facilities at Yakima city, on said railroad, for the accommodation of the public; that except at the town of "Prosser," at the falls of the Yakima river, which is a place of only about twelve houses,

37 the said railroad company have built depots and put in side tracks at places where there was no settlement and no town or business centre and where the public would receive only slight convenience or benefit, and have neglected to give and refuse to give to Yakima city, the oldest, largest, and most important public and business centre for a distance of two hundred and forty miles on the line of its Cascade Branch, any freight and passenger facilities whatever, while granting and maintaining such freight and passenger facilities to almost wholly unimportant points for the public convenience, thus unjustly, improperly, and illegally discriminating against the public and private convenience of those living in and near Yakima city and the public generally.

This is line 27 on page 7 of original complaint.

This is line 2 on page 28 of original complaint.

That said railroad company has laid out the said rival town of North Yakima and will, if not compelled to furnish freight and passenger facilities at said Yakima city, completely

destroy one-half a million of dollars' worth of property, and that the people of Yakima county and the public will suffer great loss; that said company laid out said rival town on its own land, which has no improvements thereon, and is ruining the town of Yakima city for the purpose of enhancing the value of its own town site;
38 that there is no other plain and adequate remedy to compel the said railroad company to perform its duties as common carrier through the city of Yakima than this proceeding; that public convenience requires that said railroad company be compelled to erect and maintain a freight and passenger depot at said Yakima city and stop its freight and passenger trains thereat; that said railroad company is unjustly discriminating against the rights and interests of the public by refusing and neglecting to maintain a depot and stop its trains at said Yakima city; that the common council of the city of Yakima have passed an ordinance that all railroad companies running trains through the corporate limits of the city of Yakima shall stop their trains at a convenient place regularly to receive and deliver freight and passengers; that said ordinance has not been complied with by the Northern Pacific Railroad Company; that the Northern Pacific Railroad Company built its railroad and in the month of December, A. D. 1884, began running its trains thereon and carried freight and passengers thereon for hire to and from Yakima city, in said county and Territory; that from the time it so began to act in the capacity of common carrier by the
39 construction of its line to said Yakima city until about the 25th day of January, A. D. 1885, said railroad company maintained a side track and a ticket and freight and telegraph office at said Yakima city; that during that time it received and delivered freight and passengers at said Yakima city; that while said railroad company was so maintaining a freight, telegraph, and passenger office at said Yakima city, on the line of its road, and while it was receiving and delivering freight and passengers daily at said office at said Yakima city, three commissioners appointed by the President of the United States came over the line and examined the same from near the Setas station to the 85th mile post north from the Columbia river, for the purpose of examining and reporting to the President whether or not 25 miles of said road, so constructed between said Setas station and said 85th mile post, was constructed, equipped, and maintained as a first-class road, as required by the act of Congress approved July 2nd, 1862; that said 85th mile post is about one mile north of the point at Yakima city where said company were maintaining a freight, passenger,
40 and telegraph office and selling tickets and receiving and delivering freight and passengers at the time said commissioners passed over and examined said line; that after said commissioners had viewed said road and returned to their homes said railroad company took up said side track and discontinued said freight and telegraph office and passenger office at said Yakima city and removed the same four miles north of Yakima city, to a point on its own land where there was no settlement nor improve-

This is line No. 4 of page No. 9 of original complaint.

ment, and refused thereafter to stop its trains at Yakima city and refused to deliver freight and passengers thereat; that the United States mail was carried and delivered by said railroad company at its office at Yakima city during the time its freight and passenger office was maintained at Yakima city; that the tonnage of the freight traffic at Yakima city is and would be 3,000 tons annually, and more freight and passengers would be received and delivered at Yakima city if freight and passenger facilities were given to it by the Northern Pacific Railroad Company than any other point between the Columbia river and Puget Sound,
41 on the line of the Cascade Branch of said Northern Pacific railroad; that on the 7th day of February, A. D. 1885, the common council of the city of Yakima, an existing city incorporated under the laws of Washington Territory, passed an ordinance entitled "An ordinance regulating the speed and stoppage of railroad trains within the city of Yakima," which said ordinance was duly approved by the mayor of said city, and which said ordinance required all railroad trains running through the city of Yakima to stop regularly at a convenient place for the receiving and delivering of freight and passengers; that it is necessary for the convenience of the public that a station be established at Yakima city by said railroad company on the line of its road, and that freight and passengers be delivered and received thereat; that the United States mail directed to Yakima city is carried through Yakima city and four miles north to the town of North Yakima and then brought back by a hack, making a delay of several hours in the delivery of said mails.

Line No. 27, on page No. 11 of original complaint.

42 Wherefore said plaintiff prays the court that a *preemptory* writ of mandamus be issued against defendant, commanding it forthwith to erect a station at said Yakima city, and to give proper freight and passenger facilities to said Yakima city, and to stop its trains regularly at said Yakima city, and that the relator receive his costs.

HIRAM DUSTIN, *Relator.*
REAVIS & PRUYM, *Attorneys.*

TERRITORY OF WASHINGTON, } *ss:*
County of Yakima, }

DAVID B. MAY, being first duly sworn, says that he is a citizen of Yakima city, Yakima county, Washington Territory; that he has heard read the foregoing complaint; that he has personal knowledge of the facts and statements therein contained, and that he knows the contents of said complaint, and that the same is true as he believes.

DAVID B. MAY.

Subscribed in my presence and sworn to before me by David B. May this 14th day of March, A. D. 1885.

EDWARD PRUYN,
Notary Public.

43 (Endorsement:) Service accepted this M'ch 14, 1885. Edward Whitson, of counsel for defendants. No. 301. District court, Yakima county, Territory of Washington. *Ex rel.* Hiram Dustin *vs.* Northern Pacific Railroad Company. Complaint. Filed March 14th, 1885. Kate W. Fenerbach, clerk.

44 *Rule on Motion to Strike — Complaint.*

Fourth Judicial Day, May 29th, 1885.

TERRITORY OF WASHINGTON on Relation of HIRAM DUSTIN, Prosecuting Attorney, &c., Relator and Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Respondent and Defendant.
} = 301. Motion to Strike from Complaint Granted.

And now, on the 28th day of May, 1885, the motion to strike from the complaint filed herein by the order the court entered pursuant to the written stipulation of the parties on file came on for hearing, and the same having been argued by counsel and taken under advisement, and the court being fully advised in the premises, said motion is sustained.

Whereupon it is ordered that the following parts of said complaint be, and the same are hereby, stricken out, to wit: All parts of said complaint which state conclusions of law, being averments of the duty of defendant, and contained between lines (21) twenty-one and twenty-eight (28), on page five (5), and lines one (1)
45 and four (4), page six (6), commencing at the word "that," on line (21) twenty-one, page five (5), and ending — word "require," on line four (4), page six (6); also between line twenty-seven on page seven (7) and line two (2) on page eight (8), commencing at the word "thus," in line twenty-seven on page seven (7), and ending with the word "generally," in line two on page eight (8); also all parts of said complaint not in the original affidavit and application for mandamus and contained between line four (4) on page nine (9) and line twenty-seven (27) on page eleven (11), commencing with the word "that," in line four (4) on page nine (9), and ending with the word "mails," in line twenty-seven (27) on page eleven (11).

46 Page 346.

Rule on Motion to Amend Complaint.

Fourth Judicial Day, May 29th, 1885.

THE TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC RAILROAD.
} No. 301. Motion of Plaintiffs to Amend Complaint Overruled. Exceptions Taken.

The above-entitled cause coming on to be heard on motion of plaintiff to file an amended complaint, after argument of counsel

and being fully advised in the premises, the court overrules said motion to amend; to which said ruling the plaintiff then and there excepted.

47 Page 346.

Rule on Motion to Amend Complaint.

Fourth Judicial Day, May 29th, 1885.

TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC R. R. Co. } No. 301.

This cause coming on to be heard on motion of plaintiff to amend the complaint herein so that said complaint so amended may show that the said defendant had put down a switch or side track in the city of Yakima, and had placed a station car thereon, and had received freight therefrom, and had received passengers thereon, and had stopped its trains regularly thereat in the months of ——, 1885, and that said defendant had thereafter taken up its said side track and switch in said city of Yakima and refused to stop its trains at said station car and removed the same therefrom, and Reavis & Pruyn appearing for the plaintiff and Allen & Whitson for the defendant, and the court having heard arguments and being fully advised, said motion is denied. Whereupon plaintiff excepts to said ruling and order denying said motion to amend the complaint; which exception is noted and allowed by the court.

48 *Leave to Withdraw Map, Exhibit "A."*

Sixth Judicial Day, June 1st, 1885.

TERRITORY OF WASHINGTON *ex Rel., &c.,*
vs.
NORTHERN PACIFIC R. R. Co. } = 301.

Now comes the defendant and asks leave of the court to withdraw the map marked "Exhibit A," attached to the return in this cause, and attach the same to the answer to be filed herein, and counsel for the plaintiff consenting, it is by the court so ordered.

49 *Answer.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Ter.

THE TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes The Northern Pacific Railroad Company, the above-

named defendant, and for answer to the complaint of the plaintiff herein says—

First.

It denies that it was at the time of the filing of the complaint herein or is now operating a railroad through said Yakima city.

Denies that said Yakima city has a population of six hundred or any other or greater number than two hundred.

Denies that there is no other business centre of any size or
50 importance in said county of Yakima.

Admits that at the time of the filing of said complaint there was a United States land office located at said Yakima city, but deny that the said or any land office is now located at said Yakima city.

Admits that at the time alleged in said complaint there was a public school kept in said public school building, but deny that any school is now kept therein or at said Yakima city.

Admits that at the time alleged there was a national bank established and doing business in said Yakima city, but denies that the same is now either located in or doing business in said Yakima city.

Admits that at the time alleged there were 2 hardware stores in said Yakima city, as alleged, but denies that the same or either of them are now in Yakima city.

Admits that at the time alleged there were three hotels in said Yakima city, but denies that there is now any more than one. Denies that at the time alleged there were in said Yakima city more than 2 general merchandise stores and denies that there is any more than one there.

51 Admits that at the time alleged there were 2 butcher shops in said Yakima city, but denies that the same or either of them are now in said Yakima city.

Admits that at the time alleged there were 2 harness or saddlery shops, but denies that there is more than one of them in said Yakima city now. Admits that at the time alleged there were 2 millinery stores in said Yakima city, but denies that there is now any millinery store thereat.

Admits that at the time alleged there was one jewelry store at said Yakima city, but denies that there is now any jewelry store at said Yakima city.

Denies that there was at said time alleged or is now any notion store in said Yakima city. Denies that at the time alleged there *was* or are now three or any billiard saloons in Yakima city.

Denies that at the time alleged there was or is now any steam flouring mill in said Yakima city or that there ever was. Admits that at the time alleged there was one steam planing mill in said Yakima city, but denies that the same is there now. Denies
52 that there were or are many fine residences at Yakima city.

Denies that there are merchants doing business in almost every branch of business in said Yakima city or in more than a small number of branches of business. Denies that said Yakima

city is the oldest town or business centre on the said Cascade Branch between the points alleged. Denies that said Yakima city is the largest town or most important business centre on the said Cascade Branch except the Puget Sound terminus thereof. Denies that said Yakima city is the most important point for business between the Columbia river and the Cascade Mountains. Denies that said Yakima city has been constantly or permanently growing since the year 1871.

Denies that said Yakima city is most conveniently situated for trade or business, or the central point of any large section of country. Denies that any demand has been made upon it to stop its freight or passenger trains at said Yakima city, and denies that any demand has been made upon it to build a freight and passenger depot or either at Yakima city, or to give or furnish to said
53 Yakima city the alleged proper and necessary or any freight and passenger facilities, or either, that her alleged importance as a business centre demands, or as it is alleged public convenience requires, or that any demand has been made upon it to provide any such facilities or structures.

Denies that said defendant has, through its president or chief officer, refused to give to Yakima city any such alleged privileges. Denies that it neglects or refuses to erect and maintain a station or depot for freight and passengers at said Yakima city, as the alleged convenience and necessities of the public is alleged to require. Denies that it has been requested or desired by many or any persons to deliver freight at said Yakima city. Denies that it has been requested or desired by many or any persons to ship freight thereat or to stop its passenger trains at said Yakima city. Denies that it is compelling or has compelled all or any persons desirous of taking its trains, who live in or near Yakima city, to go to North Yakima, and denies that it compels or has compelled all or any persons who ship freight or receive freight to go to North Yakima, to
54 ship or receive the same. Denies that there is any intersection of the said defendant's railroad with said alleged extension of said alleged Court street or any street in the city of Yakima. Denies that it has the present ability or ability at any time to construct or maintain a freight and passenger depot at said Yakima city, and denies that it has at all or any time the ability to give the alleged proper and necessary freight and passenger facilities at Yakima city on said railroad for the alleged accommodation of the public, as set forth in said complaint. Denies that it has built depots or put in side track- at places where there is no settlement, or no town or business centre, or where the public would receive only slight convenience or benefit.

Denies that Yakima city is the oldest, largest, or most important town or business centre for a distance of 240 miles on the line of defendant's Cascade Branch. Denies that it is granting or maintaining freight and passenger facilities to wholly or almost wholly unimportant points for the public convenience.

Denies that it will completely or at all destroy one-half
55 million dollars worth of property or any property at all, and

denies that the people of Yakima county or the public will suffer great or any loss by any act of defendant.

Denies that it laid out said town of North Yakima for the purpose of enhancing the value of its own property or for the purpose of injuring the property of any other person, persons, town, or city Denies that public convenience requires said railroad company to erect and maintain a freight and passenger depot at said Yakima or stop its freight and passenger trains thereat. Denies that said railroad company is unjustly or at all discriminating against the rights and interests of the public in not maintaining a depot at said Yakima city and in not stopping its trains thereat.

Second.

And for further answer by way of defense defendant avers—

That it has partially constructed its railroad from Pasco junction, in Franklin county, to a point 3¼ miles in a northwesterly
56 direction from Yakima city, and that it is now finishing and completing said road, and that the whole of said road between said points is now in the hands of and managed by the contractors of the Northern Pacific Railroad Company and the construction department of said company; that it is running over said road construction trains to which, for accommodation of itself and the public, it attaches and transports freight and passenger cars and freight and passengers; that defendant in locating its stations and depots has uniformly endeavored to so locate them as to accommodate to the best advantage itself and the greatest number of people and greatest amount of business.

That it has located its stations between Pasco and Yakima city so that all people between said points have convenient railroad facilities; that there are no people living within 4 miles south or east of said Yakima city; that from a point about 4 miles below Yakima city and extending along down the east bank of the Yakima
57 river are settlements, and that defendant has located stations on the line of its road so as best to accommodate said settlements.

That defendant's line of road from Yakima city northwest for a distance of 8 miles north is and will be located and constructed on the west side of Yakima river; that at said point, to wit, about 8 miles north of said Yakima city, said railroad, when constructed, will cross said Yakima river to the east side thereof; that there are not people and business sufficient between and including said Yakima city and said point to warrant and justify the defendant in constructing and maintaining more than one station and depot, and that when said defendant's road is fully completed all the people of the Wenas, Natches, Cowiche, Upper Ahtanum, and Moxee Valleys and Yakima city will necessarily be supplied with and furnished railroad facilities by and through one station, and that a station and depot at North Yakima will better accommodate all of said people with railroad privileges and facilities than at any other point; that there are now living in said Wenas, Natches,
58 Cowiche, Moxee, and Upper Ahtanum more than 15 times

as many people as there are living in said Yakima city and its immediate vicinity; that the people residing in said Wenas, Natches, Cowiche, Moxee, and Upper Ahtanum are producers, and are compelled to haul to market by teams the products of their farms, and that the expense will be less and haul shorter for said people if said station is located at said North Yakima; that the taxable property of Yakima city, personal and real, as shown by the assessment-roll for the year 1884, was $319,787, but the same is not now to exceed $50,000, and that the taxable property as shown by said assessment-roll of the Wenas, Natches, Cowiche, Moxee, and Upper Ahtanum is almost $884,000, and that in the assessment of said Yakima city defendant includes many farms; that a map showing location of defendant's road, stations, Yakima city, and said Wenas, Natches, Cowiche, Moxee, and Upper Ahtanum is hereunto annexed, marked Exhibit "A," and hereby made a part of this answer;

59 that said Yakima city on the 7th day of February, 1885, passed a purported ordinance entitled "An act to regulate the speed and stopping of railroad engines and trains within the city of Yakima; that sections 3 and 4 of said ordinance are in words following:

"SEC. 3. That all trains are required to stop at and opposite the extension of *of* Court street, in Yakima city, where said extension of said street intersects the railroad."

"SEC. 4. That all trains are required to stop at said point referred to in said last section of this ordinance, and before crossing the extension of the line of said street in said last section referred to, for a reasonable time and allow passengers to get on and off the trains and receive and deliver freights."

That section *of* five of said ordinance provides a penalty for each and every violation of said ordinance.

That to comply with said ordinance it would be necessary for defendant to build at said alleged junction a station.

60 That the charter of the city of Yakima does not and never did authorize the said Yakima city to lay out, establish, or maintain streets in said Yakima city or to pass ordinances in relation to streets or adopt regulations in respect to the use of streets by others; that the conduct and management of defendant's business requires that it erect and maintain at and adjacent to the station and depot mentioned in this answer an eight-stall round-house, repair shops, side tracks, car yards, and switches, and that respondent cannot erect and maintain but one such station, round-house, shops, and yard at or near Yakima city and North Yakima; that the soil at and near the alleged junction of said alleged Court street and defendant's road is so permeated and filled with alkali and water and is of such a nature that defendant cannot at such point erect and maintain said station or round-house, repair shops, or yard.

That defendant caused its road to be graded, track laid and

61 -lin-ed past said alleged junction in December, 1884; that defendant has been running over said road ever since but few and light construction trains, at a very slow rate of speed; that notwithstanding that defendant has taken great care and caution in

operating said portion of said road on account of the said location, defendant has been compelled to ali-ne said road four times.

Defendant further avers that it is informed and believes, and upon such information and belief says, that at said point of alleged intersection or junction, where it is now marshy and soft ground, was a few years ago dry and solid ground; that the changed condition of said ground is caused by drainage from irrigating and other ditches, and that the ground to the north and westward of said point is higher than at said point and will in the future be irrigated to a greater extent that it is at the present time, and that increased irrigation will increase the amount of drainage and
62 surface water running over and through said land at said point of junction and render it more difficult to maintain a station at said point; that the ground at said North Yakima is 85 feet higher than it is at said alleged junction of said railroad and said alleged Court street, and that at said North Yakima stations and other buildings can be erected and maintained for a reasonable expenditure of money, and they cannot be erected and maintained at said alleged junction for a reasonable amount of money, and that there is not now and will not be in the future business at said Yakima city to warrant or justify the defendant in erecting and maintaining a station at said point, even if the land at said point would admit of so doing; that defendant's charter vests in it the right to select the places for and the time and manner of building its stations, with the exception that defendant cannot erect and
63 maintain stations within the corporate limits of cities without permission, expressed or implied, and the respondent selected North Yakima as the place at which to erect and maintain stations instead of Yakima city in pursuance of said direction and for the reason that the interests of the railroad company and the people of Yakima county are and will be better served than by any other selection that defendant could have made.

That defendant is under no duty or obligation to furnish or attempt to furnish station and depot facilities at Yakima city, situated as it is, and is under no duty or obligations to stop its passenger or freight trains at said alleged intersection of said alleged Court street and said railroad.

That the citizens of Yakima city are far better accommodated and furnished with railroad facilities by the location of said station and depot at North Yakima than are the people of Wenas,
64 Cowiche, Natches, Moxee, and Upper Ahtanum.

That in laying out said town and establishing there a station and other buildings it was acting and did act for the best interests of the public and the defendant, and that it has left nothing undone that it ought to have done, required by its charter or law.

That said Yakima city heretofore was a town of a population of about 500 inhabitants, but since the construction of defendant's said railroad, by reason of the superior advantages and inducements offered at North Yakima, a large part of the population of the said Yakima city, being more than two-thirds thereof, have left and departed from said Yakima city and taken up their residence

and place of abode at North Yakima, and have also removed to North Yakima their dwelling-houses, together with their
65 respective business establishments, buildings, and employments; that there now remains in said Yakima city but 53 dwelling-houses, of which number 28 have been and are now contracted to be and soon will be removed to said North Yakima, and that of those the removal of which is uncontracted for defendant is informed and verily believes nearly all will be removed as soon as the same can be done after the business of this present term of court is completed.

That the United States land office mentioned in the complaint has heretofore been removed from Yakima city to North Yakima by and under authority of an execution order, duly made by the President of the United States, and there permanently located; that the national bank in said complaint mentioned, together with the building in which the same is conducted, has been removed
66 from said Yakima city and is now being located in said North Yakima, there to be hereafter conducted and carried on; that the said church edifices in said complaint mentioned are to be and will be immediately removed from said Yakima city to said North Yakima, there to permanently remain; that the said steam planing mill mentioned in the complaint has heretofore been removed from said Yakima city to North Yakima and has been there established; that the two hardware stores mentioned in said complaint, together with one of the buildings in which one of the same was located and carried on, has been removed to said North Yakima; that of the two general merchandise stores which were in Yakima city when the original application was filed herein one has been removed to said North Yakima and there permanently located; that of the three hotels mentioned in plaintiff's complaint two have heretofore been removed to said North Yakima and
67 there permanently located, and the third is under contract of removal and will be removed as soon as the same can conveniently be done.

That the said Yakima city is being continually abandoned by the remainder of its said inhabitants, and that no structures, buildings, employments, or business of any kind are replacing those taken therefrom, and that there are no accessions to the population of said Yakima city; that the agricultural portion of said Yakima county, which have heretofore transacted business in the said Yakima city, have ceased to do so; and the defendant verily believes that said town of Yakima city will be wholly abandoned by its inhabitants and cease to exist as a city, town, or village within six months from this date, and will afford no traffic of either freight or passengers justifying this defendant in the erection of any depots, stations, or other facilities thereat; that within the 15 days immediately
68 prior to this date 33 buildings have been removed from said Yakima city by the owners thereof, heretofore residents of said city, to North Yakima.

That said North Yakima is better situated for a convenient loca-

tion of facilities for the receipt and delivery of freight and passengers than Yakima city.

That there has been partially constructed and now is in process of construction and completion, at said North Yakima, a large station and depot designed to be used for freight and passenger accommodation when said road shall be put in operation for freight and passenger traffic, apart from the work of construction and the hauling of construction material; also an eight-stall round-house and repair shops; that said buildings and improvements were located at said point in said North Yakima because of the convenience of the location, both for the defendant and the public and people of Yakima and the high and dry condition of the land and soil at
69 that point, the immediate vicinity thereof being the place where the construction camp, supply stores, and material warehouses for the defendant's construction department had been located during the construction of said road through said portion of country and where the same are now located, said point having been selected for the purpose by reason of the better condition and character of the land and soil at that point than elsewhere along the line of said road.

That there are now in said North Yakima business men and merchants in almost every branch and line of business, trade, and employment, and have established there a large number of business structures, conveniently situated and well equipped and adapted for carrying on the respective business and employments in which they are engaged; that there are there several large, commodious, and well-equipped hotels, adapted to and in operation for the entertainment of the travelling public, as well as restaurants and saloons; that a well-appointed post office is established and in opera-
70 tion there, receiving and distributing the United States mail to all parties in said North Yakima and the vast extent of country tributary to said North Yakima, as hereinbefore set forth; that there is now located at and being operated under authority of the United States Government a United States land office, and that a large and commodious building has been erected there in which to more conveniently conduct the business of said United States land office; that the erection of new buildings and structures *are* being commenced in said North Yakima every day, and many are now in process of construction and completion; that there are now in said North Yakima several hundred people more than ever at any time resided in said Yakima city, and 5 times more than are now in said Yakima city; that by executive order of the Treasury Department of the United States a national bank has been located at said North Yakima, and the business of said bank and the building in which it is conducted are about to be established there.

71 That dwellings, structures, and business buildings are being moved into said North Yakima at the rate of two each any every day; that about 50 more are now under contract to be removed and located and established there as soon as the same can be conveniently done.

That irrigating ditches have been dug and are now maintained

and constantly kept filled with running water in all portions of said town; that streets, alleys, and public thoroughfares have been laid out and established there, running through and crossing said town in all directions; that on both sides of all the streets of said town shade trees have been planted or set out and are now growing and adding to the beauty of said town, and on all of said streets sidewalks have been built for the convenient travel of foot passengers, and other public improvements have been established and located there.

That it is absolutely necessary for the proper conduct of defendant's business and the convenience of the public that defend-
72 ant have, erect, and maintain a depot and station and freight and passenger facilities at said North Yakima, and cannot consistently with the amount of the estimates made for the construction of its road and the convenient location of its depots and stations and establishment of its freight and passenger facilities, or with justice to itself or those interested in or owning its stock, bear or be able to sustain the additional expense which would be required to erect and maintain either station or depot or any freight or passenger facilities at a point so near to said North Yakima as Yakima city, while no greater or other business or traffic could be obtained at said Yakima city than is now there.

Wherefore defendant prays that it go hence without day and have judgment for its costs and disbursements.

ALLEN, WHITSON & GILLIAM AND
McNAUGHT, FERRY,
McNAUGHT & MITCHELL,
Attorneys for Defendant.

(Here follows map marked p. 72*a*.)

73 TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

JOHN H. MITCHELL, being first duly sworn, upon oath deposes and says that he is one of the attorneys for The Northern Pacific Railroad Company, the defendant named in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

That defendant is a corporation, and affiant makes this affidavit for the reason that there is not now in the said county of Yakima any officer or agent of said defendant upon whom service of a notice could be made in this action.

JOHN H. MITCHELL.

Subscribed and sworn to before me this 1st day of June, 1885.
MITCHELL GILLIAM,
Notary Public.

(Endorsement:) Service accepted this 1st day of June, 1885.
74 Reavis & Pruyn, of counsel for plaintiff. No. 301. District court, terms at Yakima county. Territory of Washington *ex rel.*

Hiram Dustin, &c., *vs.* N. P. R. R. Co. Answer. Filed June 1st, '85. D. A. Clement, clerk.

Page 356.

Motion for Time to Plead.

Sixth Judicial Day, June 1st, 1885.

TERRITORY OF WASHINGTON
vs.
THE NORTHERN PACIFIC R. R. Co. } # 301.

Motion that pl'ff have until Wednesday, June 3d, 1885, to plead granted.

Comes now the plaintiff, by its attorneys, Messrs. H. Dustin & Reavis & Pruyn, and move the court that they have until the coming in of court on Wednesday, June 3d, 1885, to move or plead to defendant's answer in this cause filed; and, the court being fully advised in the premises, it is ordered by the court that the
75 plaintiff in said cause be given until the coming in of court on Wednesday morning, the 3rd day of June, 1885, in which to move or plead to defendant's answer.

Page 381.

Tenth Judicial Day, June 5th, 1885.

TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC R. R. Co.

This cause coming on to be heard, the defendant, by its attorney, moves the court to strike from answer; and the court, being fully advised in the premises, grants said motion; whereupon it is ordered that defendant be allowed to strike from answer.

Page 382.

Rule on Motion to Strike from Answer.

Tenth Judicial Day, June 5th, 1885.

TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC R. R. Co. } # 301.

Comes now the defendant, by its attorneys, and moves the court that they be allowed to strike from answer in this cause; and the court, being fully advised in the premises, grants said mo-
76 tion; whereupon it is ordered and adjudged that defendant be allowed to strike from answer.

Motion for Mandamus.

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

THE TERRITORY OF WASHINGTON, Plaintiff, } Motion for a Pre-
vs. emptory Writ of
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } Mandamus.

Now comes the plaintiff and moves the court that a peremptory writ of mandamus issue in the above-entitled cause against said defendant, commanding it to erect and maintain a depot at Yakima city, and give to Yakima city freight and passenger facilities, and to stop its regular trains regularly at Yakima city, according to the prayer of plaintiff's complaint.

REAVIS & PRUYN,
Of Counsel for Plaintiff.

77 (Endorsement:) Acceptance of service this 3rd day of June, 1885, waiving copy, but no other rights, not even the right to move for peremptory writ while prosecuting motion to strike. McNaught & Co. and Allen, Whitson & Gilliam, attorneys for def't. No. 301. Territory of Washington *vs.* N. P. R. R. Co. Motion for peremptory writ of mandamus; to be filed (after motion to strike) this 3rd day of June, 1885. D. A. Clement, clerk, by R. Stroback, deputy. Reavis & Pruyn, of counsel for plaintiff.

78 *Motion for Leave to File Supplemental Affidavits.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Washington Territory.

TERRITORY OF WASHINGTON *ex Rel.* &co., Plaintiff, }
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Now comes the defendant, by its attorneys, and moves the court for leave to file in this cause affidavits supplementary of and in addition to the matters now set forth in the answer herein, not heretofore stricken out of the same by order of this court, showing and setting forth facts which have arisen or taken place since the filing of the return herein, constituting matters of cause to be shown against the granting of plaintiff's complaint and matters of defense against the allegations of said complaint as well as ground of excuse for the non-compliance of the defendant with the application made in plaintiff's complaint, with leave to include in said affi-
79 davits all matters, by way of defense or excuse as aforesaid, which arose or occurred during the time intervening between

the time of the filing of the return herein and the time of the filing of the answer herein, and that the said affidavits may be taken as a part of the defendant's showing in this cause as against said complaint, to be used in connection with the answer for that purpose in the determination of this cause.

This motion is based upon the affidavit of Edward Whitson filed herewith, and upon the allegations stricken out of the answer filed herein, as sworn to and verified in said answer.

ALLEN, WHITSON & GILLIAM AND
McNAUGHT & CO.,
Attorneys for Defendants.

(Endorsement:) No. 301. Territory of Washington *ex rel.*, &c., *vs.* N. P. R. R. Co. Motion for leave to file supplemental affidavits. Filed June 5, '85. D. A. Clement, clerk.

80 *Affidavit of E. Whitson.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Ter.

TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

TERRITORY OF WASHINGTON,
County of Yakima, } *ss:*

EDWARD WHITSON, being duly sworn, upon oath deposes and says that he is one of the attorneys for the defendant in the above-entitled cause; that since the filing of the return in this cause many of the facts alleged in plaintiff's complaint and original application, relied upon by plaintiff as grounds of said application and admitted in said return, either expressly or by failure to deny the same, have ceased to and do not now exist.

That many of the matters alleged in said complaint and
81 application as ground thereof have since the filing of said return become so changed in circumstance, position, character, quantity, and condition as to render the alteration a matter of material defense on behalf of defendant in addition to the matters contained in defendant's return.

That many events have transpired since the filing of said return which are and have become material matters of defense on behalf of defendant, and which could not have been taken advantage of at the time of the filing of the return herein; that affidavits setting forth the facts, matters, and events hereinbefore referred to can be procured and filed in this cause on behalf of defendant.

EDWARD WHITSON.

Subscribed and sworn to before me this 5th day of June, 1885.
JOHN H. MITCHELL,
Notary Public in and for Washington Territory.

(Endorsement:) No. 301. Territory of Washington *ex rel.*,
82 &c., *vs.* N. P. R. R. Co. Affidavit on motion for leave to file supplemental affidavits. Filed June 5, '85. D. A. Clement, clerk.

Page 395.

Def'd't's Motion for Time to File Supplemental Affidavits.

Eleventh Judicial Day, June 6th, 1885.

TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC RAILROAD CO. } = 301.

Comes now the defendant, by its attorneys, Messrs. Jno. H. Mitchell and E. Whitson, and moves the court that it have until the coming in of court on Monday morning, June 8th, 1885, in in which to file supplemental affidavits in this cause; and the court, being fully advised in the premises, it is ordered by the court that the defendant have until the coming in of court, Monday morning, June 8th, 1885, to file supplemental affidavits in this cause.

83 *Affidavits of T. H. Cavanaugh.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima.

THE TERRITORY OF WASHINGTON on the Relation of Hiram Dustin, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

TERRITORY OF WASHINGTON,
County of Yakima, } *ss:*

THOS. H. CAVANAUGH, being first duly sworn, upon oath deposes and says that he is an agent of the Northern Pacific Railroad Company, the defendant named in the above-entitled action, and residing at North Yakima, in Yakima county, W. T.; that he is now and has ever since the 16th day of March, 1885, continuously to the present time, well acquainted with and fully cognizant of
84 the character and condition of Yakima city, in said Yakima county, during all of said time, and, at the present moment, as to the number of its inhabitants, the number, character, and location of its dwelling-houses, buildings, and business employments therein.

That on the 16th day of March, 1885, when affiant first became acquainted with said Yakima city, there were not more than 350 inhabitants in said city; that since said time a large number of said inhabitants—more than 200 thereof—have removed from said

Yakima city and have taken up their abode in North Yakima, there to permanently remain, and have removed from said Yakima city not only their dwelling-houses but their buildings in which their business had heretofore been carried on in said city, together with the respective employments or business enterprises carried on therein; that in connection with the dwellings removed from said city by the aforesaid inhabitants all stables, outhouses, and all other establishments in and upon the grounds from which said dwellings
85 were removed have been taken away from said city by the respective owners thereof and permanently established in the said North Yakima.

That since said 16th day of March, 1885, about 100 buildings have been removed from said city; that in the last 22 days immediately prior hereto as many as 44 buildings, not including any other than dwellings and business buildings, have been removed from said Yakima city and permanently established elsewhere; that but a small number of dwelling-houses remain in said city, and of those which now remain about 16 are now under contract of removal from said Yakima city, and will be removed therefrom as soon as the actual work of moving can be done, and affiant verily believes and is informed that the larger part of the remaining dwellings the removal of which is uncontracted for will in a very short time be removed from said city and established elsewhere; that only a very few business houses or establishments remain in said Yakima city, and of those that remain about 20 buildings and about the same number of business employments now con-
86 ducted therein and business outfits located therein are now under contract for removal from said Yakima city and will be removed as soon as can conveniently be done; and affiant is creditably informed and verily believes that many of those the removal of which is uncontracted for will shortly be removed from said city by their owners.

That the United States land office, mentioned in the plaintiff's complaint and which was formerly located at said Yakima city, has heretofore been removed from Yakima city to North Yakima by and under authority of an executive order duly made by the President of the United —, and there permanently located.

That the national bank in plaintiff's complaint mentioned, together with the building in which the same is conducted, has been heretofore removed from said Yakima city and is now being located in said North Yakima, there to be hereafter conducted and carried on; that two of the church edifices mentioned in plaintiff's
87 complaint, to wit, the Christian and Congregational churches, are now under contract of removal and will be removed as soon as the actual work of moving can be done.

That no structures, buildings, employments, or business enterprises of any kind replacing those taken therefrom are being erected, constructed, or established in said city, and that there are no accessions being made to the population of said Yakima city; that the agricultural portions of said Yakima county which have heretofore transacted business in said Yakima city have ceased to do so and

are now transacting business at said North Yakima, because of the convenience of its location to all of said agricultural districts.

That within a short time from this date there will be so few persons in said city and so small an amount of business transacted in said Yakima city as to afford no traffic of either freight or passengers justifying said defendants in the erection of any depots, stations, or other facilities thereat, and so as to render the construction
88 and establishment thereof futile and fruitless.

That the steam planing — mentioned in the said complaint has been removed from said Yakima city since said 16th day of March, 1885, and has been established and in operation at said North Yakima for about ten days prior hereto.

That the two hardware stores mentioned in said complaint have been removed from said Yakima city since said date, together with three store buildings in which one of said stores was carried on, and located and established in said North Yakima; that of the two general merchandise stores which were in Yakima city on said 16th day of March, 1885, one of the same, together with the store building in which the same was, has since been removed from said Yakima city and is now located and established in said North Yakima; that of the three hotels mentioned in said complaint two of the same have since the time alleged been removed from said Yakima city to said North Yakima and there permanently located.

That the grocery store mentioned in said complaint as
89 since the time alleged been removed from said Yakima city and located and established in said North Yakima; that the two butcher shops, together with the business thereof, one of the two harness and saddlery stores, two milliner stores, the one jewelry store, both business and buildings, all mentioned and set forth in plaintiff's complaint, have since the time alleged been removed from said Yakima city to the said North Yakima and there established and located; that the bakery mentioned in the complaint and the building in which the same is conducted and the notion store spoken of therein and one of the brew-ries are now under contract of removal from said Yakima city, and the ovens and appliances necessary for the proper establishment of said bakery are now being constructed at North Yakima by the owner of said bakery; that in addition to the dwellings and outhouses removed from said Yakima city by the owner- thereof the personal effects and all the personal possessions in said Yakima city of nearly all of the said owners or parties aforesaid have been taken away and
89½ brought to said North Yakima by said parties; that wherever dwellings and business houses have been removed as aforesaid the owners thereof, as well as the occupants and parties interested therein, have themselves removed from said Yakima city, abandoning their residence therein without the intention to return.

That in the course of a very short time there will remain but one or two branches of business in said Yakima city, and there will not be sufficient business from surrounding community in and about said Yakima city to justify the carrying on of said business.

THOS. H. CAVANAUGH.

Subscribed and sworn to before me this 8th day of June, 1885.
JOHN H. MITCHELL,
Notary Public in and for Washington Territory.

(Endorsement:) No. 301. Ter. of Wash. *ex rel.*, &c., *vs.* N.
90 P. R. R. Co. Affidavit of Thos. H. Cavanaugh. Filed June 8th, 1885. D. A. Clement, clerk.

91 *Affidavits of J. H. Mitchell and E. Whitson.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, W. T.

THE TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

TERRITORY OF WASHINGTON, *County of Yakima*, } *ss:*

J. H. MITCHELL and EDWARD WHITSON, being first duly sworn, upon oath doth depose and say, each for himself, that he is one of the attorneys for the defendant in the above-entitled cause; that since the time of filing the return in the same a convenient, comfortable, and commodious depot building and station-house
92 has been erected in the town of North Yakima, as well as a six-stall round-house, water tanks, and all other equipments and facilities necessary for the proper maintenance of defendant's business; that said buildings were located and established at said North Yakima because of the convenience of its location to all those parts of Yakima county from whence productions are brought to market and for shipment.

That said buildings are built upon high and dry ground, where they cannot be damaged or in anywise injured by excessive irrigation or the overflow of ditches; that since the filing of the return in this case the said town of North Yakima has grown in size and extent nearly 2 times that of any town or city between the Columbia river and Puget Sound and more than 4 times the present size of Yakima city, and so as to be the most convenient and only business centre of any size or importance for a distance of more than 40 miles in all directions therefrom.

That the public school mentioned in plaintiff's complaint
93 has, since the filing of said return, been stopped and there is not now and has not for some considerable time been any school of any kind carried on in said Yakima city; that the many changes of the circumstances and conditions of the said Yakima city occurring since said return set forth in the affidavit of Thos. H. Cavanaugh made and filed herein, which has been read by these affiants and believed by them to be true, have rendered it wholly

unnecessary that any facilities for freight and passengers should be established at said point, inasmuch as the few persons who will continue to reside there can just as conveniently obtain their supplies from the station at North Yakima, and will be no more incommoded than many citizens of Yakima county who live no greater distance in the opposite direction beyond said North Yakima, and that no persons whatever residing anywhere surrounding said Yakima city within a distance therefrom equal to the distance between said Yakima city and North Yakima will be in the least or in any way whatever, during the present condition of said Yakima city
94 or any future prospects thereof, incommoded by the failure to build or establish freight or passenger facilities there or by the failure of defendant to stop its trains at that point.

J. H. MITCHELL.
ED. WHITSON.

Subscribed and sworn to before me this 8th day of June, 1885.

D. A. CLEMENT, *Clerk.*

(Endorsement:) No. 301. Terr. of Wash. *ex rel.*, &c., *vs.* N. P. R. R. Co. Affidavits of J. H. Mitchell and Edw. Whitson. Filed June 8, '85. D. A. Clement, clerk.

95 Page 408.

Rule on Motion for Mandamus.

Twelfth Judicial Day, June 8th, 1885.

TERRITORY OF WASHINGTON
vs.
NORTHERN PACIFIC R. R. CO.

This cause coming on regularly to be heard on motion of plaintiff for a *preemptory* writ of mandamus, and the argument of counsel for the respective parties, plaintiff and defendant, having been made to the court, and the court, having carefully considered said motion and being fully advised in the premises, denies said motion.

Thereupon, on motion of plaintiff, by its attorneys, Reavis & Pruyn, it was ordered that the plaintiff have sixty days in which to move to set up additional facts by supplemental affidavits.

96 *Motion to Dismiss.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

THE TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Esq., Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY. } Motion to Dismiss.

Comes now the defendant and respondent in the above-entitled cause, by its attorneys, and moves the court to dismiss this proceeding for mandamus for the reason that this court, on the 8th day of June, 1885, denied the motion for a *preemptory* writ of mandamus filed herein on the 3rd day of June, 1885, by its order made *nade* and entered on June 8th, 1885.

97 This motion is based upon the records and papers on file in this proceeding.

McNAUGHT, FERRY, McNAUGHT, AND MITCHELL,
ALLEN, WHITSON & GILLIAM AND
J. A. NAVARRE,
Attorneys for Defendant.

(Endorsement:) No. 301. District court. Terr. of Wash. *vs.* N. P. R. R. Co. Motion to dismiss. Filed Oct. 15th, '85. D. A. Clement, clerk, by R. Stroback, deputy.

98 *Motion for Leave to File Supplemental Affidavits.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Terr.

TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiffs, *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now — the defendant, by its attorneys, and moves the court for leave to file in this cause affidavits supplimentary of and in addition to the matters now set forth in and not stricken out of the answer and the affidavits heretofore filed herein by leave of the court, showing and setting forth facts which have arisen or taken place since the filing of the said affidavits heretofore filed herein, constituting

matter of cause to be shown against the granting of plaintiff's
99 complaint and matters of defense against the allegations of said complaint, as well as ground of excuse for the non-compliance of the defendant with the application made in plaintiff's complaint, with leave to include in said affidavits all matters, by way of defense or excuse as aforesaid, which arose or occurred during the time intervening between the time of the filing of the affidavits heretofore filed herein and the present time; and that the said affidavits may be taken as a part of the defendant's showing in this cause as against said complaint, to be used in connection with the answer and the affidavits heretofore filed herein for that purpose in the determination of this cause.

This motion is based upon the affidavit of J. H. Mitchell, filed herewith.

McNAUGHT, FERRY, McNAUGHT AND MITCHELL,
ALLEN, WHITSON & GILLIAM AND J. A. NAVARRE,
Attorneys for Defendants.

(Endorsements:) No. 301. District court, terms at Yakima.
100 Territory of Washington *vs.* N. P. R. R. Co. *et al.* Motion for leave to file supplemental and additional affidavits. Filed Oct. 15th, '85. D. A. Clement, clerk, by R. Strobach, deputy.

Page 441.

Rule on Motion to Dismiss.

Third Judicial Day, Oct. 15th, 1885.

TERRITORY OF WASHINGTON
vs.
N. P. R. R. Co.

This cause coming on regularly to be heard upon the motion of defendant to dismiss this proceeding for mandamus, and the argument of counsel for the respective parties, plaintiff and defendant, having been made to the court, and the court, being fully ad-
101 vised in the premises, overrules said motion; whereupon it is ordered that said motion be, and the same hereby is, refused; to which defendant then and there in open court excepts. It was further ordered that plaintiff have leave to file reply to defendant's answer herein.

Affidavit of J. H. Mitchell for Leave to File Additional Affidavits.

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Terr.

TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

TERRITORY OF WASHINGTON, *County of Yakima*, } *ss:*

J. H. MITCHELL, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the defendant in the
102 above-entitled cause; that since the filing of the answer and the affidavits heretofore filed herein by leave of the court many of the facts alleged in plaintiff's complaint and original application relied upon by plaintiff as grounds of said application and admitted in the return herein, as well as in the answer and affidavits heretofore filed, either expressly or by failure to deny the same, have ceased to and do not now exist.

That many of the matters alleged in said complaint and application as grounds thereof have, since the filing of said answer and aforesaid affidavits, become so changed in circumstances, position, character, quantity, and condition as to render the alterations a matter of material defense on behalf of defendant in addition to the matters contained in defendant's return, answer, and the aforesaid affidavits.

That many events have transpired since the filing of said answer and returns which are and have become material matters of defense on behalf of defendant and which could not have been taken advantage of at the time of the filing of the answer and the aforesaid affidavits.

103 That affidavits setting forth the facts, matters, and events hereinbefore referred to can be procured and filed in this cause on behalf of defendant.

J. H. MITCHELL.

Subscribed and sworn to before me this 15th day of October, 1885.

MITCHELL GILLIAM,
Notary Public.

(Endorsement:) No. 301. Dis't c't, term at Yakima. Territory of Washington *vs.* N. P. R. R. Co. Affidavit on motion for leave to file supplemental affidavits. Filed Oct. 15, '85. D. A. Clement, clerk, by R. Strobach, deputy.

104 *Stipulation as to Evidence.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of Washington Territory, Holding Terms at Yakima City, in and for the Fourth Judicial District of Washington Territory.

HIRAM DUSTIN on Relation, &c., Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated that on the trial of the above-entitled case the defendant shall have the right to introduce any and all material evidence showing excuse or avoidance or supplemental facts which have taken place since the filing of the complaint herein and which may show any reason why the writ should not be granted or excuse for not complying with application, whether such facts appear by the defendant's pleading or not, and plaintiff may introduce evidence controverting the same.

105 REAVIS, PRUYN & GRAVES,
Of Counsel for Relative.
McNAUGHT & CO.,
ALLEN, WHISON AND GILLIAM AND
J. A. NAVARRE, *For Defendant.*

(Endorsement:) No. 301. Dist. c't, terms at Yakima city. Territory of Washington *vs.* N. P. R. R. Co. Stipulation. Filed Oct. 15th, '85. D. A. Clement, clerk, by R. Strobach, deputy.

106 *Motion to Strike Reply.*

TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

In the District Court of Fourth Judicial District of Washington Territory, Holding Terms at Yakima City.

TERRITORY OF WASHINGTON *ex Rel.* HIRAM DUSTIN, &c., Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Comes now the defendant, by its attorneys, and moves the court to strike from this cause the reply of plaintiff, herein filed, for the following reasons, to wit:

1st. Because said reply is not verified.

2nd. Because said reply is not verified by any one authorized by law to verify the same.

McNAUGHT, FERRY, McNAUGHT & MITCHELL,
ALLEN, WHITSON AND GILLIAM AND
J. A. NAVARRE,
Attorneys for Defendant.

107 (Endorsement:) No. 301. Territory of Washington *vs.* H. Dustin *ex rel.*, &c. Filed October 16th, '85, D. A. Clement, clerk, by R. Strobach, deputy.

108 *Motion for Reference.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Terr.

THE TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant, by its attorneys, and moves the court that the proofs and evidence of the facts in issue in this proceeding be taken and heard by the judge of this court without the submission of the same to a jury, and that if the same cannot be taken and heard by the said judge that the court, by appropriate order of reference, refer these proceedings to some qualified person as referee to take the proofs made necessary by the issues of fact herein and report the same into court for the action of the court thereon; or, if the court shall so desire or prefer, that authority to make find-
109 ings of fact upon said proofs so taken shall be granted to said referee, with direction to report the same to the court for the determination of the court thereon as to the matters of law involved thereon and raised thereby.

McNAUGHT, FERRY, McNAUGHT & MITCHELL,
ALLEN, WHITSON AND GILLIAM AND
J. A. NAVARRE,
Attorneys for Defendant.

(Endorsement:) 301. Territory *vs.* N. P. R. R. Co. Filed Oct. 17, 1885. D. A. Clement, clerk.

110 Page 448.

Rule on Motion for Reference.

Fourth Judicial Day, Oct. 16th, 1885.

THE TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
301.
Motion of Defendant for Order of Reference Denied.

This cause coming on to be heard this 16th day of October, 1885, on motion of defendant for an order of reference herein, and argument of counsel having been heard, and the court, being fully advised in the premises, denies said motion; to which ruling the defendant, by its attorneys, excepts; which exception is allowed.

111 Page 450.

Order Calling Jury.

Fourth Judicial Day, Oct. 16th, 1885.

TERRITORY OF WASHINGTON *ex Rel.* H. DUSTIN, Prosecuting Attorney,
vs.
NORTHERN PACIFIC RAILROAD COMPANY.
301.

This cause coming on regularly to be heard on this 16th day of Oct., 1885, the plaintiff appearing by its attorneys, Messrs. Reavis & Pruyn, and the defendant by its attorneys, Messrs. Mitchell, Allen, Whitson, & J. A. Navarre, and comes also, at the order of the court, the following jury of good and lawful men, who are duly elected, empanelled, and sworn to try said cause, to wit: 1, B. B. Brown; 2, D. Heaton; 3, C. Clemens; 4, N. S. Hecox; 5, S. F. Haines; 6, E. Denton; 7, W. G. Griffith; 8, Geo. Carpenter; 9, D. R. Fish; 10, R. Crory; 11, Tom Shaw; 12, Edward Wilson.

Whereupon the taking of testimony was commenced.

112 *Motion for Nonsuit.*

In the District Court, Holding Terms at Yakima City, in the — of Yakima, Wash. Ter.

TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.
No. 301.

Comes now the defendant, by its attorneys, the introduction of all proofs upon the trial having been concluded, and moves the court to dismiss this proceeding—

First.

Because the matters in the complaint set forth do not entitle the plaintiff to any of the relief in the complaint demanded.

Second.

Because the evidence adduced is insufficient to maintain the allegation of the complaint.

Third.

Because the proofs are not sufficient to entitle plaintiff to any of the relief in the complaint sought.

McNAUGHT, FERRY, McNAUGHT AND MITCHELL,
ALLEN, WHITSON AND GILLIAM AND
113 J. A. NAVARRE,
Attorneys for Defendant.

(Endorsement:) No. 301. Territory *vs.* N. P. R. R. Co. Filed Oct. 17, 1885. D. A. Clement, clerk.

Page 463.

Rule on Motion for Nonsuit.

Sixth Judicial Day, Oct. 26th, 1885.

TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } # 301.

Now, on this 17th day of October, 1885, this proceeding having proceeded to trial by a jury, the introduction of all proofs having been concluded, the defendant, by its attorneys, moves to dismiss this proceeding for reasons and upon the grounds set forth in said motion as reduced to writing and filed herein, and argument of counsel having been heard, and the court, being fully advised
114 in the premises, denies said motion; to which ruling the defendant, by its attorneys, excepts; which exception is allowed.

Questions to Jury.

Fifth Judicial Day, Oct. 17th, 1885.

TERRITORY OF WASHINGTON *ex Rel.* H. DUSTIN, Prosecuting Attorney,
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } # 301.

On this 17th day of October, 1885, the testimony in this cause being concluded and the argument of counsel having been heard, thereupon the court submitted the following questions of fact for the jury to find, to wit:

1. Was the Northern Pacific Railroad Company operating a railroad through Yakima city, W. T., on the 20th day of Feb., 1885?

2. What was the population of Yakima city, 20th day of Feb., 1885?

115 3. What is now the population of Yakima city?

4. What are the two most important business centers on the line of the defendant's road in Yakima county?

5. Is Yakima city the largest place and most important business centre in Yakima county at the present time, except the town of North Yakima?

6. Was Yakima city, W. T., the largest town and business centre in Yakima county on the 20th day of February, 1885?

7. On Feb. 20th, 1885, and at the time defendant built and operated to Yakima city, in Yakima county, was there any other town or business centre of any importance in Yakima county?

8. Did the defendant convey freight and passengers for hire to and from Yakima city, on its railroad, in the month of January, 1885?

9. Did the defendant keep, in the month of January, 1885, an agent in Yakima city, who attended to freight and sold tickets to persons who rode to and from Yakima city over the defendant's line of road?

10. Was Yakima city, in January, 1885, the oldest town
116 and business center between the Columbia river and Puget Sound on the Cascade Branch of defendant's road?

11. In January, 1885, was Yakima city the largest town and most important business centre on the Cascade Branch of defendant's road except the Puget Sound terminus thereof?

12. In January, 1885, was Yakima city the most important point for business between the Columbia river and Cascade Mountains on the Cascade Branch of defendant's road?

13. Is Yakima city more favorably located for trade or business than any other place in said county and the central point of a large section of country?

14. Has the defendant the ability to construct and maintain a freight and passenger depot at said Yakima city and freight and passenger facilities thereat?

15. What was the number of children attending the public school at Yakima city on October 16th, 1885?

16. What are the number of scholars attending the school kept by the sisters of charity at Yakima city on October 16th, 1885?

117 17. How many hotels were there in Yakima city on the 16th of October, 1885?

18. How many dwelling-houses at present time?

19. How many other buildings are there?

20. Is there a flouring mill in Yakima city October 16, 1885?

21. How many stores and places of business in Yakima city at present?

22. What amount of business was done in Yakima city annually previous to construction of defendant's road through said Yakima city?

24. Was the defendant operating its road through Yakima city on the 20th day of Feb., 1885?

25. Is there a suitable place for a depot along the line of defendant's road in Yakima city and is the ground suitable and safe and practicable for such purpose?

26. If the defendant had placed a depot and given freight and passenger facilities at Yakima city would Yakima city have retained its former size and importance?

27. Was the defendant operating its line of railroad through
118 Yakima city on the 20th day of February, 1885, for the reception of freight and passengers and has such operation continued since that time?

28. Had the Northern Pacific Railroad Co. the ability to establish a station at Yakima city on the 20th day of February, 1885, and has the defendant the present ability to establish and maintain such station?

29. Did said railroad company on or before February 20th, 1885, tender its road as fully completed and equipped to or beyond Yakima city to the United States, as provided by the act of July 2nd, 1864, and cause commissioners appointed by the President of the United States under said act to examine said road and make report of its condition to the President of the United States?

30. Had that section or portion of the Northern Pacific railroad in the complaint mentioned which runs past Yakima city or from Pasco junction to North Yakima been turned over to the operating department of the said Northern Pacific Railroad Company,
119 defendant, at the time of instituting these proceedings?

31. Was that portion of the said company's railroad from Pasco junction to North Yakima or thereabout, at the time of the complaint alleged, on M'ch 14, 1885, in the hands of the operating department of said company?

32. What demand, if any, was ever made for the establishment of freight and passenger facilities at place in the proceedings alleged?

33. Upon whom was such demand, if any, made, when made, and by whom was the same made, and upon whose appointment did the person so demanding make such demand, and was the road of defendant built at the time of demand to or near Yakima city? If not, to what point was it constructed?

34. What is the present population of Yakima city?

35. At which of the points, Yakima city or North Yakima, would the passenger and freight traffic of the people of Moxee, Ahtanam, Cunyche, Natches, Wenas, and Selah Valleys be the better accommodated, considering them as a community?

120 36. What, if any, industries are now at Yakima city which now require railroad facilities?

37. Has the defendant located a station where freight and passenger facilities are furnished at North Yakima, which is in the same valley and community as Yakima city, which is not more than four miles therefrom?

38. What distance on the line of its railroad is the nearest depot to Yakima city and what depot is it?

39. What would be the expense to such company of operating a station at Yakima city—that is, keeping the employees requisite for the conducting of the same as an agent depot as distinguished from a prepaid station?

40. State the expense defendant would incur in constructing a combined depot and warehouse at Yakima city on the line of its road, including therein the cost of grading, graveling, side-tracking, and all expense incident to the construction of such depot for practical use.

41. What amount of business has Yakima city furnished to the defendant over that portion of its road between Pasco and North Yakima for each of the months of June, July, August,
121 & 122 September, and October, 1885? State separately the amount for each of said months.

42. Are there other depots or stations for receiving freight and passengers between North Yakima and Pasco junction, and do these stations furnish sufficient facilities for all country below North Yakima?

43. What is the wear and tear and cost in stopping a train at a station?

44. If defendant was taking and conveying passengers over its said road on March 16, 1885, were such freight and passengers received as subordinate to the construction of its railroad?

45. Does the testimony show that Yakima city or any person therein furnish any production of Yakima city to be handled on defendant's road, either in the months of March, April, May, June, July, August, or September; if so, when, how much, and what?

46. Does the testimony show that Yakima city, in June, July, August, September, and October, 1885, furnished any freight for defendant to carry of the productions of Yakima city or the
123 country adjoining, if so, how much and what?

47. Are the earnings of that part of defendant's railroad extending from Pasco to North Yakima, called Yakima Division, more than sufficient to defray its operating expenses; and, if so, how much more per month?

And the jury retired to consider of their verdict in charge of a sworn officer of the court, and presently returning into court return the following verdict, to wit:

Finding of Jury.

"We, the jury in the case of Territory of Washington, plaintiff, against The Northern Pacific Railroad Company, defendant, upon the particular questions of fact submitted by the court for our findings, which questions, numbered consecutively from 1 to 47, inclusive, are hereto attached find as follows:

Upon the 1st question, yes; 2nd, 500; 3rd, 150; 4th, North Yakima and Yakima city; 5th, yes; 7th, no; 8th, yes; 9th, yes; 10th, yes; 11th, yes; 12th, yes; 13th, —; 14th, yes; 15th, 55; 16th, 25;

17th, about 2; 18th, about 27; 19th, about 13; 20th, yes;
124 21st, 13; 22nd, about $250,000.00; 24th, yes; 25, yes; 26, yes; 27, yes; 28, yes; 29, yes; 30, no; 31, no; 32, not any; 33, no demand; 34, 150; 35, North Yakima; 36, limited amount; 37, yes; 38, North Yakima; 40, about $8,000.00; 39, $150 per month; 41, June, 16,000 lbs.; July, 4,000 lbs.; August, none; Sept., 2,400 lbs.; Oct., none; 42, yes; 43, $1.00; 44, no; 45, none; 46, no; 47, no.

N. L. HICOX, *Foreman.*

Which said verdict is received by the court, and thereupon it is ordered that the jury be, and hereby is, discharged from further consideration of this cause.

125 *Motion for Judgment on Verdict for Costs.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Terr.

THE TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Esq., Prosecuting Attorney for the Counties of Kittitass, Yakima, Clarke, and Skamania, in the Territory of Washington, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant, by its attorneys, and upon the findings of fact returned into court by the verdict of the jury herein moves the court for judgment in favor of defendant for the costs of this proceeding.

McNAUGHT, FERRY, McNAUGHT AND MITCHELL,
ALLEN, WHITSON AND GILLIAM AND
J. A. NAVARRE,
Attorneys for Defendant.

126 (Endorsement:) 301. Terr. of Wash. *ex rel.*, &c., *vs.* N. P. R. R. Co. Motion for judgment for costs. Filed Oct. 26, 1885. D. A. Clement, clerk.

127 *Motion for Peremptory Writ.*

In the District Court, Holding Terms at Yakima, Wash. Terr.

TERRITORY OF WASHINGTON on the Relation of HIRAM DUSTIN, Esq., Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, and Skamania, in the Territory of Washington, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the plaintiff, by its attorneys, and upon the findings of fact returned into court by the verdict of the jury herein and the

facts admitted by defendant's answer in this cause *and* moves the court for judgment that a *peremptory* writ of mandamus issue in said cause according to the prayer — plaintiff's complaint.

REAVIS & PRUYN,
Attorneys for Plaintiff.

128 (Endorsement:) 301. Ter. Wash. *ex rel. vs.* N. P. R. R. Co. Motion for mandamus. Filed Oct. 26, '85. D. A. Clement, clerk.

129 *Stipulation for Argument.*

In the District Court, Holding Terms at Yakima City, in the County of Yakima, Wash. Ter.

TERRITORY OF WASHINGTON, *ex Rel.*, &c., Plaintiff,
vs
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant, by its attorneys, having this 26th day of October, 1885, filed herein a motion for judgment for costs, and the plaintiff, by its attorneys, having this day filed herein a motion for a *peremptory* writ of mandamus, it is hereby now stipulated by the parties hereto, through their respective counsel, that the matter of any determination by the court, upon these several motions, may be postponed until argument of counsel for the respective parties has been submitted to and heard by the court upon the said several motions, and that said argument may be made and heard on the 5th day of December, 1885, at the city or Olympia, Thurston county,
130 W. T., at such hour of said day and such place in said city as the judge of this court may determine, or as soon thereafter as counsel can be heard.

REAVIS & PRUYN,
Attorneys for Plaintiff.
McNAUHGT, FERRY, McNAUGHT & MITCHELL,
ALLEN, WHITSON & GILLIAM AND J. A. NAVARRE,
Attorneys for Defendant.

(Endorsement:) No. 301. The Territory of Washington *ex rel.*, &c., *vs.* N. P. R. R. Co. Stipulation for argument. Filed Oct. 26, 1885. D. A. Clement, clerk.

131 Page 622.

Eleventh Judicial Day, April 23rd, 1886.

TERRITORY OF WASHINGTON, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. } # 301. Judgment.

This cause coming regularly on for hearing on this 23rd day of

April, 1886, on the motion for judgment on the verdict of the jury heretofore filed in said cause, and the plaintiff being present by its counsel, Messrs. Reavis & Pruyn, and the defendant by its counsel, Messrs. Allen & Whitson and Mitchell, and the court being fully advised in the premises—

It is considered that the said defendant, The Northern Pacific Railroad Company, shall erect and maintain a station on the line of its railroad within the limits of Yakima city, and shall receive and deliver freight at said station, and shall stop its passenger trains at said station to receive and let off passengers.

132 And it is further ordered, adjudged, and decreed that a writ of *pre*emptory mandamus issue to the said defendant, commanding it, the said Northern Pacific Railroad Company, that it do erect and maintain a station on the line of its railroad within the corporate limits of Yakima city, in said Yakima county, and receive and deliver freight at said station and stop its passenger trains to receive and let off passengers at said station, and that the acts herein commanded be done immediately.

And it is further ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendent its costs and disbursements expended in this cause, and that execution issue therefor.

(S'g'd) "GEORGE TURNER," *Judge.*

133 *Notice of Appeal.*

Eleventh Judicial Day, April 23rd, 1886.

TERRITORY OF WASHINGTON, } *ss:*
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in the County of Yakima, Washington Territory.

THE TERRITORY OF WASHINGTON *ex Relati-ne* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Respondent and Defendant.

Now, on this 23rd day of April, 1886, come J. H. Mitchell and Edward Whitson, attorneys of record in the above-entitled proceedings and cause for the Northern Pacific Railroad Company, the respondent and defendant therein, into open court and give, in open court, notice that they appeal said cause and proceedings to

134 the supreme court of Washington Territory; and now it is hereby ordered by the court that said notice of appeal be entered of record in the journal of this above-entitled court.

And it is further ordered by the court that the bond upon appeal

to be given in said cause be, and hereby is, fixed at the sum of five hundred dollars.

(Endorsement:) 301. Territory of Washington, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Certified copy of the notice of appeal entry, to complete the transcript, sent to the clerk of the supreme court of Washington Territory, in this cause, on appeal from dist. c't of 4th jud'l dist. of Wash. Terr., holding
135 & 136 terms at North Yakima, W. T. Received & filed Dec. 28, 1886. R. G. O'Brien, clerk.

137 *Writ of Mandamus.*

TERRITORY OF WASHINGTON, } *ss:*
County of Yakima, }

In the District Court, Holding Terms at North Yakima.

TERRITORY OF WASHINGTON on Relation of H. DUSTIN, Prosecuting Attorney, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The United States of America to the Northern Pacific Railroad Company, Greeting:

Whereas it manifestly appears to us by the relation of H. Dustin, prosecuting attorney for the Territory of Washington, the plaintiff herein, that your said railroad company have not erected and maintained a station at Yakima city, in Yakima county, said Washington Territory, and have not received and delivered freight in said Yakima city, and have not stopped your passenger trains to re-
138 ceive and let off passengers at said Yakima city; and whereas it manifestly appears to us by the judgment of our court, made and entered in said court on the 23rd day of April, 1886, that it is your duty to do the said acts which you have not done, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore we do command you that immediately after the receipt of this writ you do erect and thereafter maintain a station on the line of your railroad within the corporate limits of said Yakima city, and that you do receive and deliver freight thereat, and that you do stop your passenger trains thereat to receive and let off passengers.

And of this writ and what you have done thereunder make due return on or before the 7 day of June, 1886.

Witness the Honorable George Turner, associate justice of the supreme court of the Territory of Washington, assigned to the
139 fourth judicial district thereof, and the seal of said court this 23rd day of April, 1886.

[SEAL.] D. A. CLEMENT, *Clerk*,
By R. STROBACH, *Deputy*.

(Endorsement:) No. 301. Territory of Washington *vs.* N. P. R. R. Co. Writ of mandamus. Returned and filed April 23rd, 1886. D. A. Clement, clerk, by R. Strobach, deputy.

140 *Assignment of Errors.*

TERRITORY OF WASHINGTON *ex Rel.*, &c., Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant, Northern Pacific Railroad Company, assigns errors as follows.

I.

That the proceedings in the above-entitled cause are not commenced by the proper relator or in the name of or on behalf of the real party in interest.

II.

That Yakima city is the real party in interest.

III.

The application and petition do not state facts sufficient to constitute a cause of action.

IV.

The findings of the jury are not sufficient to sustain and are inconsistent with the judgment rendered thereon by the court.

V.

The jury found that existing depots and stations between
141 North Yakima and Pasco furnished sufficient railroad-station facilities.

VI.

The jury found affirmatively that the railroad, at the time of the application and return thereof, was in the hands of the railroad contractors and construction department.

VII.

That the business furnished said railroad company by said Yakima city and its people and transacted at said Yakima city by said railroad was not sufficient to pay the running expenses of a station at said place.

VIII.

The jury found that no demand whatever was ever made upon the Northern Pacific Railroad Company for the said station or other depot facilities mentioned in the said application and the judgment of said court.

IX.

No facts are found showing any necessity for other or additional stations and facilities than those already furnished.

X.

142 The charter of the Northern Pacific Railroad Company vests in said company an uncontrollable discretionary power in reference to locating and constructing and maintaining its stations.

XI.

That the matters set forth in the application and findings by the jury are not matters which the law specially enjoins as a duty resulting from an office trust or station.

XII.

That the judgment rendered by the court in the above-entitled case on the findings of the jury and writ thereon on the same day are vague, uncertain, and insufficient in not directing and defining what said Northern Pacific Railroad Company was to do under said judgment and writ, especially as to the character, kind, and class of station and facilities to be furnished, and requires an impossibility, to wit, that said station be constrncted instantly.

McNAUGHT, FERRY, McNAUGHT AND MITCHELL AND
ALLEN, WHITSON AND GILLIAM,
Attorneys for Defendant.

143 (Endorsement:) No. 301. District court, terms at N. Yakima. Terr. of Wash. *ex rel.*, &c., *vs.* N. P. R. R. Co. Assignments of error. Received & filed Jan. 19th, 1887. R. G. O'Brien, clerk.

144 *Bond on Appeal to Supreme Court of W. T.*

TERRITORY OF WASHINGTON, } *ss:*
County of Yakima, }

In the District Court of the Fourth Judicial District of Washington Territory, Holding Terms at North Yakima, in the County of Yakima, W. T.

THE TERRITORY OF WASHINGTON *ex Relatione* of HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Know all men by these presents that we, The Northern Pacific Railroad Company, as principal, and J. W. Shull and T. J. V. Clark, residents of Yakima county, in the Territory of Washington, as sure-

ties, are held and firmly bound unto The Territory of Washington in the sum of five thousand ($5,000.00) dollars, lawful money
145 of the United States; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-third day of April, 1886.

The conditions of the above and foregoing obligation are such that whereas judgment has been rendered heretofore this day by the above-entitled court in the above-entitled cause, granting the issuance of a *preemtory* writ in said cause, commanding the defendant to erect and maintain a station on the line of its road within the limits of Yakima city, to receive and deliver freight thereat, and to stop its passenger trains thereat, and to receive and let off passengers, and whereby it was adjudged by the said court that the said Territory of Washington should have and recover of and from the defendant the costs of said action, to be taxed, and that execution should issue therefor; and whereas the Northern
146 Pacific Railroad Company has given notice of an appeal of said cause to the supreme court of Washington Territory, and the said above-entitled court has fixed the amount of the bond to be given upon said appeal at the sum of five thousand ($5,000.00) dollars:

Now, therefore, if the said defendant, The Northern Pacific Railroad Company, shall pay to the plaintiff, The Territory of Washington, all costs and damages that shall be adjudged against it, the said defendant, on the said appeal and shall satisfy and perform the judgment and order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the above-entitled district court, then this obligation to be void; otherwise to be and remain in full force and effect.

THE NORTHERN PACIFIC RAILROAD COMPANY,
By V. G. BOGUE, [SEAL.]
Its Principal Assistant Engineer.
J. W. SHULL. [SEAL.]
T. J. V. CLARK. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. MITCHELL.

147 TERRITORY OF WASHINGTON, } ss:
County of Yakima, }

J. W. Shull and T. J. V. Clark, as sureties named in the above and foregoing bond, being each for himself duly sworn, upon oath doth depose and say, each for himself, that he is a resident of Yakima county, Washington Territory; that he is worth the sum of

five thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

J. W. SHULL.
T. J. V. CLARK.

Subscribed and sworn to before me this 23rd day of April, 1886.

D. A. CLEMENT,
Clerk District Court, 4th Judicial Dist. of Washington Territory.

(Endorsement:) No. 301. Dist. c't. terms at N. Yakima. Territory of Washington *vs.* N. P. R. R. Co. Bond upon appeal.
148 Approved and filed this 23rd day of April, A. D. 1886. D. A. Clement, clerk.

149 *Order of Supersedeas.*

In the District Court of the Fourth Judicial District of Washington Territory.

THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the above-named Hiram Dustin, relator; to Messrs. Reavis & Pruyn, attorneys for relator, and to J. J. Tyler, sheriff of the said county of Yakima, W. T.:

Whereas judgment was rendered in the above-entitled cause on the 23rd day of April, 1886, granting the issuance of a *pre*emptory writ of mandamus herein, commanding the defendant to erect and maintain along the line of its road, within the city limits of Yakima city, a station to receive and let off freight and passengers thereat, and to stop its trains thereat to let off and receive
150 freight and passengers thereat; and whereby it was adjudged that plaintiff should have and recover of and from the defendant the costs of said action, to be taxed, and that execution should issue therefor; and whereas, thereafter, on said 23rd day of April, 1886, the said defendant, by its counsel of record, gave notice, in open court, of an appeal of said cause to the supreme court of Washington Territory, and the said court thereupon fixed the amount of the bond to be given on appeal at the sum of five thousand dollars; and whereas the said *pre*emptory writ of mandamus directed by said judgment to be issued was heretofore issued on the said 23rd day of April, 1886; and whereas the said defendant heretofore, on said 23rd day of April, 1886, caused to be executed, before the clerk of said court, a bond upon appeal, with two sufficient sureties, approved by said clerk of said court, in the sum of five thousand dollars, conditioned as required by law and as directed by said court:

Now, therefore, you are commanded, in the name of the
151 United States, to make return of said *preemptory* writ of mandamus into court forthwith, without any service or execution of the same, the filing of said bond on the said 23rd day of April, 1886, having superseded all authority under said writ; and you will therefore stay and suspend all further proceedings under the same.

[SEAL.] Witness the Hon. George Turner, judge of the fourth judicial district of Washington Territory, and the seal of said court this day, 23rd of April, 1886.

D. A. CLEMENT, *Clerk*,
By R. STROBACH, *Deputy*.

(Endorsement:) No. 301. Dist. c't, terms at N. Yakima. Terr. of Wash. *vs.* N. P. R. R. Co. Order of supersedeas.

152 TERRITORY OF WASHINGTON, } *ss*:
Fourth Judicial District, }

I, D. A. Clement, clerk of the district court of the fourth judicial district of Washington Territory, do hereby certify that the foregoing (from page No. 1 to page No. 150, both inclusive) is a full, true, and correct transcript of so much of the record in the above-entitled cause, except the reply, motion to strike from complaint, and motion to strike from answer, as I am by statute required on appeal to transmit to the supreme court.

Seal District Court, Yakima County. In testimony whereof I have hereunto set my hand and the seal of said district court this 19th day of June, A. D. 1886.

D. A. CLEMENT, *Clerk*,
By R. STROBACH, *Deputy*.

153 *Affidavit of J. H. Mitchell as to Assignm'ts of Errors.*

In the Supreme Court of Washington Territory.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* of HIRAM DUSTIN, Prosecuting Attorney for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in the Territory of Washington, Defendant in Error.

TERRITORY OF WASHINGTON, } *ss*:
County of Thurston, }

JOHN H. MITCHELL, Jr., being first duly sworn, upon oath deposes and says that he is one of the attorneys for the plaintiff in error in this court and defendant and respondent in the court below; that in conjunction with James McNaught, another of the attorneys for said plaintiff in error, affiant, at Seattle, King county, W. T., where he and said McNaught reside, caused to be prepared assignments

of error in the cause No. 301 of the district court of the
154 fourth judicial district of Washington Territory, holding terms at North Yakima, in the county of Yakima, W. T., entitled "The Territory of Washington *ex relatione* Hiram Dustin, prosecuting attorney for the counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, Washington Territory, respondent and defendant," which is the cause now on appeal from the judgment of said court to this court by writ of error, entitled in this court as first above stated, to be used and relied upon as the errors upon which the appeal of said cause should be based in this court.

That said affiant, when said assignment of errors was completed and signed, forwarded the same in two duplicate originals to Edward Whitson, one of the attorneys for said plaintiff in error, at North Yakima, W. T., where said Whitson resided, with instructions to serve upon J. B. Reavis, one of the attorneys for the defendant in error, then and now residing at North Yakima aforesaid, the one of said originals which should first arrive and be received by
155 him, and then thereafter to file the same with the clerk of the court at said North Yakima.

That one of said originals was deposited in the post office at Seattle aforesaid, with postage prepaid, enclosed in an envelope addressed to said Edward Whitson at North Yakima aforesaid, and the other of said originals was at the same time and on the same day deposited in the office of the Northern Pacific Express Company at Seattle aforesaid with the agents thereof, enclosed in an envelope addressed to said Edward Whitson, at North Yakima, W. T., aforesaid, the amount of expressage necessary to carry the same to said North Yakima over the lines of said express company being prepaid at the time of said deposit in said office.

That said assignment of errors was prepared and the said duplicate originals were forwarded as aforesaid within twenty days after the entry of the notice of appeal by said plaintiff in error and the allowance of the same upon the journal of the aforesaid district court, to wit, within twenty days after the 23d day of April, 1886.

156 That thereafter, in a short time from the time of so forwarding said assignment of errors, affiant received a letter through the post office at Seattle from said Edward Whitson at North Yakima notifying him that the said assignment of errors had been received, served on the said J. B. Reavis, and filed with the aforesaid clerk within the twenty days aforesaid.

That thereafter and prior to the commencement of the July term of this supreme court for the year 1886, and within sufficient time to permit the clerk of said district court to prepare and forward to this supreme court a transcript of the proceedings had in said cause in said district court, so that the same could be filed in this court within the time required by the laws of this Territory and the rules of this court, affiant, in conjunction with the said James McNaught, prepared and forwarded to the clerk of said district court at North Yakima instructions in writing directing him to prepare and forward to the clerk of the supreme court at Olympia, within the time

required by law, a correct transcript of the proceedings had in said cause in said district court which are and were by him required to be certified to this court upon writ of error, including all
157 pleadings, journal entries therein, as well as the assignment of errors and supersedeas and bond upon appeal.

That affiant supposed that said transcript had been so certified to this court; that upon seeing the record certified up to this court by said clerk and satisfying himself that the same had been filed in this court and the said cause docketed herein within the time required by law, and knowing that the said J. B. Reavis had personally accepted service and acknowledged receipt of a copy of the brief of plaintiff in error, which acceptance and acknowledgment is endorsed in writing and signed by himself upon the back of the same, and that said Reavis had filed and served a brief on the merits herein in answer thereto without making any motion or taking any exception or objection to the record upon the appeal herein or any of the appellate proceedings herein, affiant had no occasion to particularly examine and did not examine the record and transcript now on file in this cause in this court certified up by the clerk of said district court until the 18th day of January,
158 1887, while in the course of preparing the case of the plaintiff in error for argument upon the merits.

That consequently affiant did not discover until said 18th day of January, 1887, that the clerk of said district court had failed to certify up to this court as a part of the transcript and record in this cause said assignment of errors.

That affiant had just arrived at Olympia from Seattle prior to making such discovery, having come to Olympia upon information having been received from said James McNaught that said cause would come on for argument this 19th day of January, 1887.

That at the time said assignment of errors was prepared and forwarded as aforesaid a true, correct, and accurate copy of the same was, in addition to said duplicate originals, at the same time prepared in the office of affiant, at Seattle, and has ever since been retained in the possession of affiant; which said copy is hereto attached, marked Exhibit "A," and made a part of this affidavit.

That affiant had, during the trial and pendency of said cause in the lower court and since its appeal to this court, special
159 & 160 charge and control of the same on behalf of the plaintiff in error and was relied upon to look after the same.

JOHN H. MITCHELL, JR.

Subscribed and sworn to before me this 19th day of January, 1887.

NATHAN S. PORTER,
Notary Public.

Received and filed Jan. 19th, 1887.

R. G. O'BRIEN, *Clerk.*

(Endorsed on back:) No. —. In the supreme court. The Northern Pacific Railroad Company *vs.* The Territory of Washington *ex*

rel., &c. Affidavit of J. H. Mitchell, Jr. Received & filed Jan. 19, 1887. R. G. O'Brien, clerk.

161 *Leave to File Assignment of Errors.*

In the Supreme Court of Wash. Ter. January Term, 1887.

NORTHERN PACIFIC RAILROAD CO.
vs.
THE TERRITORY OF WASHINGTON *ex Rel.* HIRAM DUSTIN. } # 461.

Comes now the plaintiff in error, by its attorneys, McNaught, Ferry, McNaught and Mitchell, and move- the court for leave to file assignment of errors herein, the same having been omitted from the transcript, and the court, being fully advised in the premises, grants said motion.

And now this cause coming on regularly for trial upon the transcript of the record, and the court having heard the argument of counsel, takes the matter under advisement.

Wednesday, January 19th, 1887.

162 *Judgment.*

SATURDAY, *January* 29, 1887.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* THE TERRITORY OF WASHINGTON *ex Rel.* HIRAM Dustin, Prosecuting Attorney for the Counties — Kittatass, Yakima, Clarke, and Skamania, in Washington Territory,	461.	Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the 4th judicial district of Washington Territory, holding terms at Yakima city, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 29th day of January, A. D. 1887, on motion of H. J. Snively, Esquire, of counsel for defendant in error, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed, with costs,

163 and that the said Territory of Washington recover of and from the said Northern Pacific Railroad Company and J. W. Schull and T. J. V. Clarke, sureties on the appeal bond herein, the costs of this action, taxed and allowed at $—, and that execution issue therefor.

And it is further ordered that this cause be remitted to the said district court for further proceedings.

To which ruling and judgment of the court plaintiff in error, by its counsel, excepts, and said exception is allowed.

164 In the Supreme Court of Washington Territory. January Term, 1887.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Rel.* HIRAM DUSTIN, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klikitat, Clarke, & Skamania, W. T., Defendant in Error.
No. 461. Opinion.

Opinion by Hoyt, J. Filed Jan. 29, 1887.

This was a proceeding in the name of the Territory to compel the defendant, The Northern Pacific Railroad Company, to furnish for the convenience and use of the public a depot and other facilities for the transaction of business at Yakima city, in the county of Yakima.

The case was heard on the pleadings and proofs, and a judgment substantially as prayed for rendered by the district court, which has been brought here by the defendant for review.

165 The facts established by the pleadings and the findings of the jury thereunder were substantially as follows:

In January, 1885, the defendant had completed its railroad up the Yakima valley to and through Yakima city, and at its request such railroad had been duly examined and accepted by commissioners on the part of the United States as a section of its line duly constructed and finished under the charter of said company.

For a short time during said month of January said company maintained an agency in said city for the transaction of freight and passenger business, but as soon as the said railroad reached a point about four miles beyond said Yakima city, where a town site had been laid out called North Yakima, it withdrew said agency from Yakima city and established it at North Yakima and there-

166 after ceased to stop its trains at the former place, and ran directly through the same on to the latter, where it established passenger and freight depots for the transaction of business.

At this time Yakima city was the oldest town and largest business center on the Cascade Branch of said railroad between the Columbia river and Puget Sound.

It was the only town of any importance in Yakima county.

It had for years been the county-seat of said county, and was one of the three places in the fourth judicial district where causes arising under the Constitution and laws of the United States could be heard and determined.

It numbered 500 permanent inhabitants; had several churches, flourishing public and private schools, a large number of business buildings, and many beautiful homes.

167 It was equipped for the transaction of and actually transacted a business of two hundred thousand or three hundred thousand dollars per annum, and had available grounds upon which the company could have located its depot and other build-

ings, while North Yakima was simply a town upon paper, with no inhabitants save a few speculators, who, being in the secrets of the company, had located there for the purpose of profiting by the building up of a town at the expense of Yakima city and its pioneers, many of whom had for years endured the hardships of frontier life in the hope that with the advent of a railroad such prosperity would be brought upon them as would repay every sacrifice.

Not only was this the relative position of the two towns as to population, industries, &c., but, so far as the proof discloses,
168 there was no material difference in the natural adaptability of the two places, by way of location or otherwise, for a center of railroad business.

From the time the company thus moved its agency for the transaction of its business to North Yakima it not only refused to regularly stop its trains at Yakima city, but it also refused to stop any of its trains there at any time or for any purpose, and thus compelled all passengers, therefore, to pass directly through to North Yakima and then return the four miles as best they could, and all freight had to pay tribute to North Yakima in like manner.

Such was the condition of things at about the time these proceedings were commenced, and the jury found that such would
169 have been the condition of things at the time of the trial in the court below had the company continued to stop its trains at said Yakima city and to give it facilities for the transaction of its freight and passenger business.

It appears, however, that, owing to the failure of the railroad company thus to stop its trains, the town had been, to a certain extent, depopulated; still, at the time of trial, the town contained two hotels, 27 dwelling-houses, 13 business houses, one flouring mill, public and private schools, and a resident population of 150.

It further appears that the said company furnished no facilities of any kind available to said town excepting at the said town of North Yakima.

It was upon this state of facts that the court below acted,
170 and in that light we must determine whether or not it acted correctly.

We say that it is upon these facts that the case must be decided, for although there was a finding by the jury that the present facilities between North Yakima and Pasco were sufficient, we are of the opinion that the facts being conceded or found, the determination of what are proper facilities thereunder is a matter of law for the court and not a question of fact for the jury.

Did the facts above stated warrant the court below in rendering the judgment in question?

We will first examine the matter in a general way and then notice the particular points raised by the brief of appellant.

In the absence of legislation providing other means for regulating and controlling the matter, we have no doubt of the power
171 of a court of general jurisdiction, in a proper case, to compel a railroad to extend to the public proper facilities for the transaction of business. This we deem to be a necessary incident

to the character of a railroad and the rights it possesses and the relation which it occupies to the public.

Without this control a railroad might be so managed as to be a public improvement only in name, while, to all intents and purposes, so far as results were concerned, it would be a private road, from the benefits of which the mass of the public could without reason be at the pleasure of the company entirely excluded.

We think that in reason this right of control is fully estab-
172 lished, and if we investigate it in the light of authority our conclusion will be assured, for while the cases upon the subject are not numerous, yet those that have been cited by counsel for appellee and others which we have examined are of such authority and so conclusive in argument that we unhesitatingly accept them as the true exposition of the law upon the subject. (See Railroad Company *vs.* P. & O. C. R. R. Co., 63 Maine, 280; The State *ex rel.* Maltoon *vs.* Republican Valley R. R. Co., 17 Neb., 647; State *vs.* The Hartford & N. H. R. R. Co., 29 Conn., 538; High on Extraordinary Remedies, 225 & 227; Ruggles *vs.* Illinois, 108 U. S., 526; Field on Corporations, 585, and Moses on Mandamus, 155 to 169.)

That the city of Yakima was of such importance at the time
173 the railroad reached it that the public interests required that depot facilities should be provided and trains stopped for the transaction of business is so apparent that nothing need be said to satisfy any unprejudiced mind in regard thereto.

It is true that a town of five hundred inhabitants is not a large town, but when we take into consideration the fact that this town was the largest one for a distance of hundreds of miles, and that by its age and enterprise it had established itself as the center of business for that entire region and grown to even that size without the aid of any railroad, it is clear to the moral as well as to the legal perception of every one that it was entitled to be fairly treated
by the railroad and to have extended to it the facilities
174 usually given to towns of like size thus situated, and we are satisfied that there is not another instance on record where a town, as remote from others as this one, of even half its size has been reached and passed through by a railroad and then had all facilities denied it at the will of the railroad company.

That this town was entitled to the facilities claimed seems to have been assumed by the company at one time, as from the above facts we see that for a short time after the road was constructed through the town it finished the same to as great an extent as could be expected of a newly constructed road; but as soon as the road reached a place four miles beyond, where the country was substantially un-
occupied and unmarked, save by a few stakes stuck in the
175 ground, a change came over the company and it all at once discovered that every reason that could be named or imagined pointed to this unoccupied spot as the proper place for its depot, and that Yakima city, which in the past, unaided by outside influences, had grown into a flourishing town while the other had only grown bushes, was no longer entitled to be thought of in comparison therewith.

The reasons which led to this change and to this preference of the new town, which seems not only to have been located for the purpose of absorbing the hard-earned business of Yakima city, but had inaugurated its career in that direction by stealing the best half of its name, does not clearly appear from the record, but enough does appear therein to plainly suggest the reason for such action.

176 Upon general principles, then, it was the duty of the railroad company to have furnished the required facilities at Yakima city, and its failure to do so was a moral and legal wrong.

But it is said that the rights of the parties must be governed by the condition of things at the time of trial and not as of the date of the commencement of the proceedings.

This may be so, but even if it is we think that under the circumstances of this case even the town as it existed at the time of trial was entitled to have trains stop and to have depot facilities furnished for the accommodation of the public, for while it is true that the showing of business at such town during the few months preceding the trial was not flattering, yet as the decrease in business

177 was not only the direct result of the decadence of the town by reason of the wrongful acts of the company, but was also, no doubt, much influenced by the fact that in order for any business to be transacted that would show upon the books of the railroad it had to first go four miles away from the market center of the town and then pay tribute to its rival.

The town, small though it was, thus decreased in importance, was entitled to the relief demanded, unless some of the objections to the proceedings raised by the appellant are of such a nature as to avail it as matter of defence herein.

We will proceed to notice such of them as we consider pertinent, which have not already been sufficiently covered by what we have said:

178 First. It is objected that as the road was still in the hands of the construction department it could not be required to furnish the facilities in question.

We think, however, that by causing such section of road to be examined and accepted by commissioners as fully completed the company estopped itself from thereafter claiming that the same was still in process of construction, and that by such action the right and duty of the company to maintain and operate such section of road became fully vested and fixed.

Besides, we doubt whether the courts would allow a company, even while constructing its road, to so manage it as to crush out one town on its line for the benefit of a rival one a few miles away.

179 Second. No demand for the facilities required was ever made upon the company.

That a demand would be necessary as a foundation of proceedings of this nature to establish a mere private right is conceded; but it is claimed by appellee that this was a question of public right, and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary.

We think this claim is established by the facts and law of this

case. (See High on Extraordinary Remedies, 203 and 390; Angel and Ames on Corporations, 715; Board of Commissioners of Knox Co. *vs.* Aspinwall, 24 Howard U. S., 376.)

Third. That the public were not interested, and that therefore Yakima city and not the Territory was the proper party plaintiff.

But as we think the proof shows that the public were interested and had rights to be protected and enforced, we cannot sustain this objection.

180 Fourth. That the charter of the company vested in it discretion as to the location of its stations, and that this discretion could not be controlled by the courts.

We do not think Congress ever intended to do more by the section of the charter of the company upon which this claim is founded than to authorize it, in a general way, to locate its stations where it might think necessary, and it seems clear that Congress never could have intended to make such company the sole judge in this matter as between its own interest or favoritism and the rights of the public at large.

Such a construction would be clearly against public policy and would only be adopted by the courts where no other was possible, and we do not think the language made use of in said section such as to oblige us to construe it as claimed by the company.

181 Fifth. That the granting of the relief prayed for is an encroachment on the legislative power and not the exercise of judicial authority.

We have already indicated our views upon this point and need only to say in addition that in our opinion the authorities cited by appellant are not in point and do not warrant the construction placed upon them by counsel.

Sixth. That the judgment rendered directing the issuance of a peremptory writ ordered that the acts therein commanded should be performed immediately, and that as this was impossible the judgment was void.

In our opinion, there is nothing in this position, as we think the judgment, fairly construed, did nothing more than to command that the duties therein enjoined should be entered upon at once and prosecuted with diligence until completed.

182 We think the court below committed no error, and it follows that the judgment must be affirmed with costs, and the cause remanded for further proceedings, and it is so ordered.

JOHN P. HOYT,
Associate Justice.

We concur:

ROGER S. GREENE,
Chief Justice.

WILLIAM G. LANGFORD,
Associate Justice.

McNaught, Ferry, McNaught & Mitchell, and Allen, Whitson & Gilliam, for plaintiff in error; Reavis, Pruyn & Graves, and H. J. Snively, for defendant in error.

183 *Affidavit of J. H. Mitchell, Jr., as to Amount in Controversy.*

In the Supreme Court of Washington Territory, Holding Terms at Olympia, W. T. January Term, 1887.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendants in Error.

TERRITORY OF WASHINGTON, } *ss:*
County of Thurston, }

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says that he is one of the attorneys of record in the above-entitled cause for the plaintiff in error and had special charge of the conduct of all proceedings in behalf of plaintiff in error had in the lower court, from which said cause was brought to this court on
184 writ of error; that he has had special charge of all proceedings upon the appeal of said cause to this court and during the pendency of said appeal herein.

That said plaintiff in error is a corporation created, organized, and existing under and by virtue of an act of Congress, and there is not now within said county of Thurston any officer or agent of said corporation authorized or competent to make this affidavit.

Affiant says that the amount in controversy in the above-entitled cause and the amount involved therein—that is, the value of the matter in dispute is more than five thousand dollars, exclusive of costs.

That said cause is in the nature of an application for a writ of mandate to compel the plaintiff in error to erect and maintain in the limits of the city of Yakima, in Yakima county, Washington Territory, a station, and to stop its freight and passenger trains thereat to receive and deposit freight and passengers.

That the jury found upon the trial of the case in the court below as one of their special findings, in response to an appropriate
185 question submitted to them by the court, that the erection of such station, with its necessary appurtenances and facilities, would require an expenditure of eight thousand dollars.

That the proofs made and evidence introduced on the trial of said cause in the court below on behalf of plaintiffs in error as to the question of the expenditure necessary to erect said station was clearly to the effect that eight thousand dollars was the lowest amount for which such station could be erected, and fully sustained said finding, no evidence having been offered to dispute the same.

J. H. MITCHELL, JR.

Subscribed and sworn to before me this — day of January, 1887.

NATHEN S. PORTER,
Notary Public.

(Endorsement:) No. —. In the supreme court, at Olympia.
186 January term, 1887. N. P. R. R. Co., pl't'ff in error, *vs.* The Ter'y of Wash. *ex rel.*, &c. Affidavit as to amount in controversy. Received & filed Jan. 29, 1887. R. G. O'Brien, clerk.

187 *Motion for Writ of Error to Supreme Court of U. S.*

In the Supreme Court of Washington Territory, Holding Terms at Olympia. January Term, 1887.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, Washington Territory, Defendant in Error.

Now comes the plaintiff in error, by its attorneys, having heretofore excepted to the ruling and decision of the court rendered upon the merits in this cause, said exceptions having been allowed by the court, — moves the court for the allowance of a writ of error to the Supreme Court of the United States of America from said ruling and decision and from the judgment of the court rendered and entered in accordance therewith affirming the judgment of the court
188 below; and further moves the court to fix the time within which plaintiff in error shall be required or permitted to file a supersedeas bond and prepare, settle, and file its bill of exceptions in this cause, and to designate the particular justice who shall approve said bond when prepared.

This motion is based upon the affidavit of J. H. Mitchell, Jr., filed herewith, showing the amount in controversy, and upon all the papers and the record in the cause in this court showing the questions involved.

McNAUGHT, FERRY, McNAUGHT & MITCHELL AND
ALLEN, WHITSON & GILLIAM,
Attorneys for Plaintiff in Error.

(Endorsement:) No. —. In the supreme court, at Olympia. January term, 1887. N. P. R. R. Co., plaintiff in error, *vs.*
189 Terr'y of Wash. *ex rel.*, &c. Motion for writ of error. Received and filed Jan. 29, 1887. R. G. O'Brien, clerk.

190 *Order Granting Writ of Er. and Fixing Bond on Appeal.*

In the Supreme Court of Washington Territory, Holding Terms at Olympia. January Term, 1887.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.

The motion of plaintiff in error for the allowance of a writ of error to the Supreme Court of the United States in the above-entitled cause, heretofore filed on the 29th day of January, 1887, having on the same day been brought on to be heard, and it now on the same day appearing to the court from the affidavits of J. H. Mitchell, Jr., one of counsel for plaintiffs in error, and of J. M. Buckley, its
191 assistant general manager, and from the records in this cause that the value of the matter in dispute in the above-entitled cause exceeds the sum of five thousand dollars, exclusive of costs, and it also appearing to the court from the records in the cause that the construction of a statute of the United States in brought in question, and the court being otherwise fully advised in the premises, grants said motion; and now, therefore, it is ordered by the court that a writ of error to the Supreme Court of the United States to the judgment of this court in the above-entitled cause be, and hereby is, allowed; and it is further ordered that the Hon. Roger S. Greene, chief justice of this supreme court, be, and hereby is, designated as the judge who shall take and approve the security, which shall operate as a supersedeas upon suing out said writ of error, and issue the citation upon said writ of error; and it is ordered that the amount of said supersedeas for the purpose of the prosecution of said writ of error be fixed at the sum of ten thousand dollars, and that the said plaintiffs in error have and hereby is given
192 sixty days from this date as time within which to prepare and file said supersedeas bond.

Enter.

ROGER S. GREENE,
Chief Justice.

(Endorsement:) No. —. In the supreme court of Washington Territory. January term, 1887. The Northern Pacific Railroad Company, plaintiff in error, *vs.* The Territory of Washington *ex rel.* Hiram Dustin, prosecuting attorney, &c. Received & filed Jan. 29, 1887. R. G. O'Brien, clerk. Allowance of writ of error.

193 *Affidavit of Buckley as to Value.*

In the Supreme Court of Washington Territory, Holding Terms at Olympia. January Term, 1887.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Kittitas, Klikitat, Yakima, Clarke, and Skamania, in Washington Territory, Defendant in Error.

TERRITORY OF WASHINGTON, *County of Pierce*, } *ss:*

J. M. Buckley, being first duly sworn, upon oath deposes and says that he is assistant general manager of the Northern Pacific Railroad Company, the above-named plaintiff in error; that the value of the matter in dispute and amount in controversy in the above-entitled cause, exclusive of costs, exceeds the sum of five thousand dollars.

J. M. BUCKLEY.

194 Subscribed and sworn to before me this second day of February, 1887.

JOHN H. MITCHELL, JR.,
Notary Public in and for Washington Territory.

(Endorsement:) No. —. In the supreme court. N. P. R. R. Co., pl't'ff in error, *vs.* Terr. of Wash. *ex rel.*, &c., def't in error. Affidavit showing amount in dispute. Received & filed Feb. 3, 1887. R. G. O'Brien, clerk.

195 *Order of Supersedeas.*

In the Supreme Court of Washington Territory, Holding Terms at Olympia.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.

This cause coming on for hearing, upon the motion of the plaintiff in error for a supersedeas and stay of proceedings therein, both in this court and the district court of the fourth judicial district of Washington Territory, holding terms at North Yakima, the court, being fully advised in the premises, grants said motion; and it is ordered by the court that on the filing of bond by plaintiff in error,

in accordance with the order of the court heretofore made,
196 all said proceedings be stayed, and that the same be, and hereby are, now stayed as against the said plaintiff in error during the said sixty days' time given the said plaintiff from and after the 29th day of January, 1887, within which to file said bond.

(Endorsement:) No. —. Supreme court, Washington Territory. Order of supersedeas. Northern Pacific Railroad Company, pl't'ff in error, *vs.* Terr. of Wash. *ex rel.*, &c. Received & filed Feb. 4, 1887. R. G. O'Brien, clerk.

197 *Assignment of Errors.*

In the Supreme Court of the United States of America, of October Term, in the Year of Our Lord one thousand eight hundred and eighty-seven.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington, Territory, Defendant in Error.

On the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, comes the said Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings in the above-entitled cause, before the
198 judges of the supreme court of Washington Territory, there is manifest error, in this, to wit:

First. That the proceedings in the above-entitled cause were not commenced by the proper relator or in the name or on behalf of the real party in interest.

Second. That Yakima city is the real party in interest.

Third. The application and petition do not state facts sufficient to constitute a cause of action.

Fourth. The findings of the jury are not sufficient to sustain and are inconsistent with the judgment rendered thereon by the court.

Fifth. The jury found that existing depot and stations between North Yakima and Pasco furnished sufficient railroad-station facilities.

Sixth. The jury found affirmatively that the railroad, at the time of the application and the return thereto, was in the hands
199 of the railroad contractors and construction department.

Seventh. That the business furnished said railroad company by said Yakima city and its people and transacted at said Yakima city by said railroad was not sufficient to pay the running expenses of a station at said place.

Eighth. The jury found that no demand whatever was ever made upon the Northern Pacific Railroad Company for the said station

or other depot facilities mentioned in the said application and the judgment of said court.

Ninth. No facts are found showing any necessity for other or additional stations and facilities than those already furnished.

Tenth. The charter of the Northern Pacific Railroad Company vests in said company a discretionary power in reference to locating and constructing and maintaining its stations.

Eleventh. That the matters set forth in the application
200 and findings by the jury are not matters which the law specially enjoins as a duty resulting from an office, trust, or station.

Twelfth. That the judgment rendered by the court in the above-entitled cause affirming the judgment of the district court rendered on the findings of the jury and the writ thereon are vague, uncertain, and insufficient in not directing and defining what said Northern Pacific Railroad Company was to do under said judgment and writ, especially as to the character, kind, and class of station and facilities to be furnished, and requires an impossibility, in this, to wit, that said station be constructed immediately.

And the said Northern Pacific Railroad Company prays that the judgment of the supreme court of Washington Territory heretofore rendered in the above-entitled cause on the 29th day of January, 1887, may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JAMES McNAUGHT,
Attorney for Plaintiff in Error.

201 (Endorsement:) In the Supreme Court of the United States of America. The Northern Pacific Railroad Company, pl't'ff in error, *vs.* The Territory of Washington *ex rel.* Hiram Dustin, prosecuting att'y, &c. Assignment of errors and prayer for reversal. Filed Feb. 8th, 1887. R. G. O'Brien, clerk.

202 In the Supreme Court of the United States, of the July Term.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.
} Writ of Error.

The President of the United States to the honorable judges of the supreme court of the Territory of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, in a suit between The Northern Pacific Railroad Company,

plaintiff in error, and The Territory of Washington *ex relatione* Hiram Dustin, prosecuting attorney in and for the counties of
203 Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, defendant in error, a manifest error hath happened, as is said, to the great damage of the said Northern Pacific Railroad Company, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October, A. D. 1887, it being the tenth day of said month, in the said Supreme Court to be then and held, so that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that *order* what of right and according to the laws of the land ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice
204 of the said United States Supreme Court, and the seal of said Court this 8th day of February, A. D. 1887.

R. G. O'BRIEN, *Clerk.*

(Endorsed on back:) In the supreme court, Washington Territory. Writ of error. Returned and filed Feb'y 8th, 1887. R. G. O'Brien, clerk.

205 *Citation upon Writ of Error to Judgment of Supreme Court of Washington Territory.*

In the Supreme Court of the United States of America.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To the Territory of Washington and to Hiram Dustin, prosecuting attorney in and for the counties of Yakima, Kittitass,
206 Klikitat, Clarke, and Skamania, in Washington Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Washington Territory, wherein The Northern Pacific Railroad Company is plaintiff and The Territory of Washington upon the relation of you, the said Hiram Dustin, as prosecuting attorney in and for the counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington

Territory, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger S. Greene, chief justice of the supreme court of Washington Territory, this fourth day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

ROGER S. GREENE,
Chief Justice.

207 APRIL 6TH, 1887.

Service of the within and foregoing citation accepted and copy received this 6th day of April, 1887.

J. B. REAVIS,
Counsel for Defendant in Error.

(Endorsement:) In the United States supreme court. Citation. The Northern Pacific Railroad Company, pl't'ff in error, *vs.* The Territory of Washington *ex relatione* Hiram Dustin, &c., def't in error. Error to judgment of supreme court of Washington Territory. Received & filed July 18, 1887. R. G. O'Brien, clerk.

208 *Bond on Appeal.*

In the Supreme Court of the United States.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.

Know all men by these presents that we, The Northern Pacific Railroad Company, plaintiff in error above named, and Isaac W. Anderson and W. J. Cogswell, are held and firmly bound unto the Territory of Washington in the sum of ten thousand dollars, to be paid to the said Territory of Washington; to which payment, well and truly to be made, we bind ourselves and each of us, and each of the heirs, executors, and administrators of us and each of us, and the successors and assigns of us, the said Northern Pacific
209 Railroad Company, and each of the same, jointly and severally, firmly by these presents.

Sealed with our seals and dated this fourth day of March, 1887.

Whereas the above-named Northern Pacific Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Washington Territory:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute

its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NORTHERN PACIFIC
RAILROAD COMPANY, [SEAL.]
By JAMES M. BUCKLEY, [SEAL.]
Its Agent and Attorney-in-Fact.
ISAAC W. ANDERSON. [SEAL.]
M. J. COGSWELL. [SEAL.]

Delivered in the presence of—
W. O. CHAPMAN.
W. B. KELLY (*M. J. C.*).

210 TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

Isaac W. Anderson and M. J. Cogswell, sureties named in the within and foregoing bond, being first duly sworn, upon oath, each for himself, doth each for himself say that he is a resident of Pierce county, Washington Territory; that he is worth the sum of ten thousand dollars over and above all his debts and liabitities and exclusive of property exempt from execution.

ISAAC W. ANDERSON.
M. J. COGSWELL.

Subscribed and sworn to before me this fourth day of March, 1887.

[NOTARY SEAL.] W. O. CHAPMAN,
Notary Public in and for the County of Pierce and Territory of Washington.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

On this fourth day of March, 1887, before me, the undersigned, a notary public in and for said county and Territory, personally
211 appeared Isaac W. Anderson and M. J. Cogswell, to me personally known to be the persons mentioned in the within and foregoing bond and who signed and sealed the same as sureties thereto, and acknowledged to me upon oath that they executed, signed, and sealed the same as their own free act and deed, freely and voluntarily, for the uses and purposes therein mentioned.

[Notary Public Seal.] In witness whereof I have hereunto set my hand and notarial seal this fourth day of March, 1887.

W. O. CHAPMAN,
Notary Public in and for the County of Pierce and Territory of Washington.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

On this fourth day of March, 1887, personally appeared before me, the undersigned, a notary public in and for the county and

Territory aforesaid, James M. Buckley, of Tacoma, in said county and Territory, personally known to me to be the same person
212 described in and who executed by power of attorney the within and foregoing bond as the agent and attorney-in-fact of the Northern Pacific Railroad Company, named in said bond as a party thereto and therein described as executing the same by its attorney-in-fact aforesaid, and the said James M. Buckley acknowledged to me that he executed the same freely and voluntarily as and for the act and deed of the said Northern Pacific Railroad Company and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my seal as such notary the day and year in the certificate first above written.

[NOTARIAL SEAL.] W. O. CHAPMAN,
Notary Public in and for the County of Pierce and Territory of Washington.

The foregoing bond and sureties are approved.
Dated Seattle, Washington Territory, this 4th day of March, 1887.
ROGER S. GREENE,
Chief Justice.

213 (Endorsement:) In the Supreme Court of the United States. The Northern Pacific Railroad Company, plaintiff in error, *vs.* The Territory of Washington *ex relatione* Hiram Dustin, prosecuting attorney, &c. Supersedeas bond on writ of error. Filed March 9, 1887. R. G. O'Brien, clerk.

214 *Power of Attorney.*

Resolved, That James M. Buckley, of Tacoma, Washington Territory, be, and he is hereby, authorized and empowered to execute, under seal or without seal, as may be required, and deliver for and in the name of this company any and all bonds or undertakings which may be required to be executed by or for this company in any and all legal proceedings now pending or that may hereafter be commenced in any court in the State of Oregon or in the Territory of Washington or in the Territory of Idaho, according to law or the rules and practice of any such court, including all bonds or undertakings necessary to be given by this company on appeal to the higher courts of said State or Territories or to the Supreme Court of the United States, and that the secretary deliver to the said James M. Buckley a copy of this resolution duly certified.

215 *Certificate of S. Wilkeson.*

NORTHERN PACIFIC RAILROAD CO.'S OFFICE,
No. 35 WALL STREET, NEW YORK CITY,
February 24th, 1887.

I, Samuel Wilkeson, the secretary of the Northern Pacific Railroad Company, certify that the annexed is a true copy from the

minutes by me kept, as such secretary, of a meeting of the board of directors of said company duly held on the 27th day of January, 1887, and that a resolution, of which the annexed is a copy, was on that day unanimously adopted by said board of directors; and to this certificate, for verification, I affix the corporate seal of said company.

[N. P. R. R. Co. Seal.]

SAM'L WILKESON,
Secretary N. P. R. R. Co.

(Endorsement:) Resolutions of board of directors N. P. R. R. Co. granting power of attorney to James M. Buckley to sign appeal bonds. Filed March 12, 1887. R. G. O'Brien, clerk.

216 *Appearance of Jas. McNaught.*

In the Supreme Court of the United States.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE TERRITORY OF WASHINGTON *ex Relatione* HIRAM DUSTIN, Prosecuting Attorney in and for the Counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania, in Washington Territory, Defendant in Error.

To the clerk of the above-entitled court.

SIR: You will please enter my name and appearance at attorney and counsel for the above-named plaintiff in error in the above-entitled cause.

JAMES McNAUGHT.

(Endorsement:) In the Supreme Court of the United States
217 of America. The Northern Pacific Railroad Company, pl't'ff in error, *vs.* The Territory of Washington *ex rel.* Hiram Dustin, prosecuting att'y, &c. Request of James McNaught for entry of his name as attorney and counsel for pl't'ff in error. Filed Feb'y 8th, 1887. R. G. O'Brien, clerk.

218 In the Supreme Court of W. T. January Term, 1887.

NORTHERN PACIFIC R. R. Co.
vs.
THE TERRITORY OF WASHINGTON *ex Rel.* HIRAM DUSTIN. } No. 461. Cost bill.

Clerk's fees	$22 25
Binding transcripts	4 00
Sheriff's fees	
Printing brief	15 00
Attorney fee	15 00
Miscellaneous fees, transcript to Supreme C't U. S.	67 00
Total	$123 25

TERRITORY OF WASHINGTON, } ss:
County of Thurston, }

—— ——, being first duly sworn, says that he is of counsel for the — in the above entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true as he verily believes.

—— ——.

Subscribed and sworn to before me this — day of ——, 188—.
—— ——, *Clerk.*

[Endorsed:] No. 461. In supreme court W. T. January term, 1887. N. P. R. R. Co. *vs.* The Territory of Wash'n. Cost bill. Filed August 12, 1887.

219 In the Supreme Court, W. T. January Term, 1887.

I, R. G. O'Brien, clerk of the supreme court of Washington Territory, hereby certify the annexed writings, from pages 1 to 152, to be a true copy of the transcript of the record of the district court of the 4th judicial district of Washington Territory, holding terms at Yakima city, as the same now appears on file in my office, and upon which the said cause was tried and determined in this supreme court.

I further certify that so much of said writings annexed from pages 153 to 218 are true transcripts of the record and proceedings of this supreme court and all papers pertaining to the trial of this action.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 12th day of August, A. D. 1887.

Seal of Supreme Court, Washington Territory.

R. G. O'BRIEN, *Clerk.*

Endorsed on cover: Washington Territory supreme court. No. 244. The Northern Pacific Railroad Company, plaintiff in error, *vs.* The Territory of Washington *ex relatione* Hiram Dustin, prosecuting attorney in and for the counties of Yakima, Kittitass, Klikitat, Clarke, and Skamania. Filed October 17, 1887.

Office Supreme Court U. S.
FILED,
MAR 3 1891
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

October Term, 1890.

No. 244.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE TERRITORY OF WASHINGTON, on the relation of Hiram Dustin, Prosecuting Attorney for the Counties of Kittitass, Yakima, Klickitat, Clark and Skamania,
Defendant in Error.

In Error to the Supreme Court of the Territory of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES McNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff.

McGILL & WALLACE PRESS, 1107 E STREET, WASHINGTON, D. C.

McGILL & WALLACE
PRINTERS,
1107 E STREET N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 244.

NORTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF WASHINGTON, ON THE RELATION OF HIRAM DUSTIN, PROSECUTING ATTORNEY FOR THE COUNTIES OF KITTITASS, YAKIMA, KLICKITAT, CLARK AND SKAMANIA, DEFENDANT IN ERROR.

In Error to the Supreme Court of the Territory of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error, in February, 1885, filed an application in the fourth judicial District Court of Washington Territory for a writ of mandamus to compel the plaintiff in error to build and maintain a station, and stop its trains, at Yakima City, and to furnish for the convenience and use of the public, other facilities for the transaction of business there (Rec., 1–4). After the filing of this application under the code, the defendant in error

prepared and filed a complaint setting forth that Yakima City contained a population of six hundred inhabitants, United States land office, court-house, graded school with an average attendance of 125 scholars, three churches, national bank, post-office of the fourth class, two hardware stores, three general merchandise stores, one grocery store, two butcher shops, two harness and saddlery stores, one bakery, two millinery stores, one jewelry store, one notion store, one cigar and tobacco store, three billiard saloons and two breweries, one flour mill, many fine residences and many other buildings; that Yakima City, by ordinance, in January, 1885, provided that the plaintiff in error shall construct and maintain a station within the limits of Yakima City, at or near the junction of the railroad, with a street named in such ordinance; that a demand had been made upon the plaintiff in error to construct and maintain a freight and passenger depot at Yakima City, and to receive freights shipped therefrom, and to land and discharge freights shipped thereto, and that the public convenience requires the railroad company be compelled to erect and maintain a freight and passenger depot and station, and stop its trains for freight and passengers at Yakima City. (Rec., 12 *et seq.*)

The plaintiff in error, in its answer and return, and by affidavits supplemental thereto, filed by leave of Court, denies that Yakima City contains a national bank or United States land office, or any hardware store, or more than one merchandise store, or any grocery store, or any butcher shop, or any millinery store, or any jewelry store, or any notion store; or any billiard saloon, or any planing mill, or more than one hotel, or more than one church, or any fine residences; that Yakima City has or contains a population of six hundred inhabitants; that Yakima City had any freight to ship therefrom and but very little freight to ship thereto, or any business whatever justify

ing or warranting the construction and maintaining of a station there; that any demand has ever been made to construct and maintain a freight and passenger depot at said Yakima City, or to stop its trains and receive and discharge freights thereat, or any demand whatever has been made on said company in relation thereto; that public convenience requires the construction and maintaining of a station at that point; and, that Yakima City contains but 150 people; that the railroad from Pasco Junction to North Yakima, at the time of filing such application and complaint, was in the hands of and managed by the contractors of the Northern Pacific Railroad Company and the construction department thereof; that the trains running over the road at such time were run for the convenience and use of the contractors and the construction department; that in the construction of the railroad plaintiff in error had uniformly endeavored to locate its stations so as to accommodate, to the best advantage, the greatest volume of business and number of people, and that it has located its stations between Pasco and North Yakima so that all people between those points have sufficient and convenient railroad facilities; and further avers, that there are no people living within four miles of Yakima City; that the population of the county of Yakima is not more than three thousand; that two thousand five hundred of this population reside in Moxee, Upper Ahtanum, Cowychee, Natches, Wenas and Selah valleys, and in North Yakima; that there are not business and people sufficient, in the country included between points four miles south and east of Yakima City, and the point where the railroad crosses, from the west to the east side of the Yakima river, eight miles northward from Yakima City, to warrant the construction and maintaining of two depots, and that the inhabitants of the valley aforesaid would be better accommodated by the construction of a station at

North Yakima than at Yakima City, or at any other point; and further avers that the place selected by the said Yakima City for the construction and maintaining of the station and depot is not a desirable and suitable place therefor. (Rec., 18, *et seq.*)

The essential averments in the complaint are squarely and fairly met, without any evasion, by the answer.

It seems a reply was filed to this answer, but it is not contained in the record. It is not deemed material, however, as the important facts were distinctly at issue between the parties without this; and as the parties went to trial without it, it is considered as waived.

Upon the foregoing and other issues, not necessary to be mentioned here, made by the original application, together with the complaint and the answer and return, as well as supplemental showing, the defendant in error, at the May term, 1885, of the Court moved the Court for the issuance of a peremptory writ as prayed for in the application, which motion was thereupon denied; (Rec., 34). Several motions were made from time to time by the parties and ruled on, and exceptions were properly saved, but they are not of any moment as the case is now presented here. The case was tried and submitted to a jury in the latter part of October, 1885, upon the issues as above recited on special and direct questions propounded by the Court, and the jury rendered a verdict in answer to each question. (Rec., 41–45.) All that is material to the issues is as follows:

Q. Had that section or portion of the Northern Pacific Railroad, in the complaint mentioned, which runs past Yakima City, viz., from Pasco Junction to North Yakima, been turned over to the operating department of the said Northern Pacific Railroad Company, defendant, at the time of instituting these proceedings?

A. No.

Q. Was that portion of the said company's railroad from Pasco Junction, or thereabouts, at the time in the

complaint alleged, viz., March 14th, in the hands of the operating department of said company?

A. No.

Q. What demand, if any, was ever made for the establishment of freight and passenger facilities at that place in the proceedings alleged?

A. Not any.

Q. What is the present population of Yakima City?

A. One hundred and fifty.

Q. At which of the points—Yakima City or North Yakima—would the passenger and freight traffic of the people of Moxee, Ahtanum, Cowychee, Natches, Wenas and Selah valleys, be the better accommodated, considering them as a community?

A. North Yakima.

Q. What, if any, industries are now at Yakima City which now require railroad facilities?

A. Limited amount.

Q. Has the defendant located a station where freight and passenger facilities are furnished at North Yakima, which is in the same valley and community of Yakima City, which is not more than four miles therefrom?

A. Yes.

Q. What distance, on the line of its road, is the nearest depot to Yakima City, and what depot is it?

A. North Yakima.

Q. State the expense defendant would incur, in constructing a combined depot and warehouse at Yakima City, on the line of its road, including therein the cost of grading, graveling, side-tracking, and all expenses incident to the construction of such depot for practical use?

A. About $8,000.

Q. What would be the expense to such company of operating a station at Yakima City; that is, keeping the employees requisite for the conducting of the same as an agent depot as distinguished from a prepaid station?

A. $150.00 per month.

Q. What amount of business has Yakima City furnished to the defendant over that portion of its road between Pasco and North Yakima for each of the months of June, July, August, September and October, of 1885? State separately amounts for each of said months.

A. June, 16,000 pounds; July, 4,000 pounds; August, none; September, 2,400 pounds; October, none.

Q. Are there other depots or stations for receiving freight and passengers between North Yakima and Pasco Junction, and do these stations furnish sufficient facilities for all country below North Yakima?

A. Yes.

Q. What is the wear and tear in cost in stopping a train at a station?

A. One dollar.

Q. If defendant was taking and carrying passengers over its said road on March 16, 1885, was such freight and passengers received as subordinate to the construction of its railroad?

A. No.

Q. Does the testimony show that Yakima City, or any person therein, furnished any productions of Yakima City to be hauled on defendant's road either in the months of March, April, May, June, July, August or September? If so, when, how much, and what?

A. None.

Q. Does the testimony show that Yakima City in June, July, August, September and October, 1885, furnished any freight for defendant to carry of the productions of Yakima City or the county adjoining? If so, how much and what?

A. No.

Q. Are the earnings of that part of defendant's railroad extending from Pasco to North Yakima, called Yakima Division, more than sufficient to defray its operating expenses; and if so, how much more per month?

A. No.

Upon this verdict plaintiff in error moved for judgment in its favor for costs, and thereupon defendant moved for the issuance of a peremptory writ. Judgment was rendered directing the construction and maintaining of a station within the corporate limits of the city of Yakima, without specifying the kind or character or the locality of construction, or the time in which the work should be done or the cost thereof. (Rec., 46–7.)

The case was appealed by the railraad company to the

Supreme Court of the Territory, and that court affirmed the judgment of the District Court, and the company sued out a writ of error which brings the case here. (Rec., 57–68.)

The assignment of errors will be found, Rec., 66–7, and upon them a reversal is asked, they are—

"*First. That the proceedings in the above-entitled cause were not commenced by the proper relator or in the name or on behalf of the real party in interest.*

"*Second. That Yakima City is the real party in interest.*

"*Third. The application and petition do not state facts sufficient to constitute a cause of action.*

"*Fourth. The findings of the jury are not sufficient to sustain and are inconsistent with the judgment rendered thereon by the Court.*

"*Fifth. The jury found that existing depot and stations between North Yakima and Pasco furnished sufficient railroad-station facilities.*

"*Sixth. The jury found affirmatively that the railroad, at the time of the application and return thereto, was in the hands of the railroad contractors and construction department.*

"*Seventh. That the business furnished said railroad company by said Yakima City and its people, and transacted at said Yakima City by said railroad, was not sufficient to pay the running expenses of a station at said place.*

"*Eighth. The jury found that no demand whatever was ever made upon the Northern Pacific Railroad Company for the said station or other depot facilities mentioned in the said application and the judgment of said Court.*

"*Ninth. No facts are found showing any necessity for other or additional stations and facilities than those already furnished.*

"*Tenth. The charter of the Northern Pacific Railroad Company vests in said company a discretionary power in reference to locating and constructing and maintaining its stations.*

"*Eleventh. That the matters set forth in the application and findings by the jury are not matters which the law specially enjoins as a duty resulting from an office, trust, or station.*

"Twelfth. That the judgment rendered by the court in the above-entitled cause affirming the judgment of the District Court rendered on the findings of the jury and the writ thereon are vague, uncertain, and insufficient in not directing and defining what said Northern Pacific Railroad Company was to do under said judgment and writ, especially as to the character, kind, and class of station and facilities to be furnished, and requires an impossibility, in this, to wit, that said station be constructed immediately."

While the assignment of errors points out, quite plainly and distinctly, the defects in this proceeding, it is scarcely worth while to argue each and all of them in detail, but it is deemed best to state the several objections to the claim set up by the defendant in error and the ruling by the court below, and cite the authorities applicable and thus cover the points made by the errors assigned.

The writ of mandamus is authorized and limited by section 691 of the Code of Washington Territory, and can only be issued to "compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station."

Code Washington Territory, p. 147.

This differs not much from the definition given in these days to the writ of mandamus by the authorities generally.

High, Ex. Leg. Rem., 2d ed'n, sec. 1, note 1.

Section 5 of the charter of the plaintiff in error reads as follows: "Sec. 5. And be it further enacted, that said 'Northern Pacific Railroad' shall be constructed in a substantial and workmanlike manner, with all necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock equal in all respects to railroads of the first class when prepared for business." 13 Stat. 368.

Under such findings, code and charter, we maintain:

I.

That the railroad, at the time of the application, was in the hands of the contractors of the Northern Pacific Railroad Company and the construction department thereof, and as such it was purely private property, and the *quasi* public duties and responsibilities usually connected with the operation and management of a railroad, completed and in operation, had not attached to it; and that the acts to be performed or left unperformed by the contractors or construction department in relation to the railroad are not duties resulting from an office, trust or station.

Shoemaker *et al. vs.* Kingsbury, 12 Wall., 369.
Griggs *vs.* Houston, 104 U. S., 553.

II.

A specific demand for the increased facilities is a condition precedent to the right to the issuance of the writ.

Kemerer *et al. v.* State, 7 Neb., 130.
State *v.* Schaack, 28 Minn., 358.
People *v.* Romero, 18 Cal., 90.
Talcott *v.* Harbor Comms., 53 Cal., 199.
Price *v.* Riverside Land and Irrigating Co., 56 Cal., 431.
Lee Co. *v.* State, 36 Ark., 276.
2 Waterm. Corp., 822.
4 Am. & Eng. Ency. Law, 291, note 2.
Redf. Ry., 675, note 6 (6th edition).

And the party on whom the demand is made must be made aware of the purpose of the demand.

Rex *v.* Wilts, &c., 3 A. & E., 477.
Rex *v.* B. & E. R. Co., 4 A. & E., (N. S.), 162.
State *v.* Governor, 1 Dutch., (N. J.), 331.

State *v.* Lehre, 7 Rich., (S. C.), 234.
Condit *v.* Commis., 25 Ind., 422.
Mos. Man., 176.
High Ex. Leg. Rem., § 41.
Minnesota *v.* Hall., 17 Minn., 429.

III.

Section five of the charter of plaintiff in error requires it to construct such stations only as are needed in the economical conduct of its business, considering the interests of the public and the company.

McCulloh *v.* State, 4 Wheat., 316.
Camden & Amboy R. & T. Co. *v.* Commis., 23 N. J., 510.
State *v.* Mayor, &c., 36 *Ib.*, 166.
Stuyvesant *v.* Mayor, etc., 7 Cow., 588.
Lucien Walton *et al. v.* Atchison, Topeka, & Santa Fe R. R. Co., Report of Kansas Railroad Commissioners, page 212 (1885).
George W. Dean *et al. v.* Humeston & Shenandoah R. R. Co. *et al.*, Report of Iowa Railroad Commissioners, page 533 (1884).
Citizens of Haworden *v.* Chicago, Milwaukee and St. Paul R. R. Co. *et al.*, *Ibid.*, page 537.
J. B. Crandall *v.* Chicago & Northwestern Railway Co. *et al.*, *Ibid.*, page 578.
Citizens of Warren Township *v.* Chicago & Northwestern Railway Co. *et al.*, *Ibid.*, 598.

IV.

For five months prior to the trial the business furnished the plaintiff in error by Yakima City did not exceed, as shown by the findings of the jury, ten dollars per month, or one-thirtieth of the cost of maintaining a station, stopping and starting trains, and the interest on the cost of constructing the depot. Mandamus lies only

to prevent a failure of justice and where there is not a specific remedy in the ordinary course of law, and there should not only be a lack of specific remedy, but there must be a specific legal right.

People *v.* Olds. 58 Am. Dec., 398.
People *v.* Spruance, 8 Colo., 319.
Klokee *v.* Stanley, 9 Am. & Eng. Corp. Cas., 465.
A., T. & S. F. R. R. Co. *v.* D. & R. G. R. R. Co., 110 U. S., 681.
People *v.* Batchellor, 53 N. Y., 128.
People *v.* Corporation of Brooklyn, 19 Am. Dec., 502.
High Ex. Leg. Rem., §§ 550 and 552.
People *v.* Hayt, and People *v.* Gerow, 66 N. Y., 606.
State *v.* School District No. 9 *et al.*, 8 Neb., 92.

It must be a clear legal right, and not a doubtful one:

Board of Police *v.* Grant, 47 Am. Dec., 102.
People *v.* Johnson, 39 Am. Rep., 63.
Arberry *v.* Beavers, 55 Am. Dec., 791.
Woods' Field Law Corp., 2d edition, 678.
Ex parte Trapnall, 42 Am. Dec., 676 (S. C., 6 Ark., 9).

V.

The charter of the plaintiff in error vests in the company the discretionary power of locating its stations at such places as will satisfy business demands and compensate the company. This discretion cannot be controlled by mandamus.

People *v.* Bell, 4 Cal., 177.
Flagley *v.* Hubbard, 22 *ib.*, 34.
United States *v.* Guthrie, 17 How., 304.
United States *v.* Seaman, *ib.*, 225.
1 Rorer on Railroads, 140.
High Ex. Leg. Rem., 42, 278.

Draper *v.* Notewore, 7 Cal., 276.
People *v.* Sexton, 24 *ib.*, 78.
Marquez *v.* Frisbie, 101 U. S., 473.
Redf. Ry's, 155.
A., T. & S. F. R. R. Co. *v.* D. & G. R. R. Co., 110 U. S., 681.
Arberry *v.* Beavers, 55 Am. Dec., 791.
Penfield Town Co. *et al. v.* Southern Kansas Railway Co., Report Kansas Railroad Commissioners, 229 (1885).

VI.

Plaintiff in error cannot be required to furnish facilities in advance of the business. Such are not necessary facilities.

People *v.* Long Island Railroad Co., 31 Hun. (N. Y., 135).
A., T. & S. F. R. R. Co. *v.* D. & G. R. R. Co., 110, U. S., 681.
Kemerer *v.* State, 7 Neb., 133.
People *v.* Corporation of Brooklyn, 19 Am. Dec., 502.
State *v.* School District No. 9, 8 Neb., 92.

VII.

The jury found as a fact that the railroad company, at the time of the trial, had already located its stations so as to furnish sufficient station facilities. It cannot be said that defendant in error has a clear legal right and is justly entitled to more than sufficient railroad facilities. Mandamus will not lie to prevent an anticipated omission of duty, nor to enforce any duty about which there is any reasonable doubt, and only where the remedy will be effectual, and not of trifling consequence or importance.

Field Corp., 502.
High Ex. Leg. Rem., sup., 12, note 1.

VIII.

It will be conceded that a portion of the ordinance of Yakima City in relation to furnishing station facilities therein is void. Mandamus will not lie to enforce a void ordinance.

State *v.* Missouri Pacific Railroad, 20 Am. and Eng. Railroad Cas., 45.

Dill. Mun. Corp., 353.

IX.

Yakima City, by its charter and ordinances, has attempted, and is attempting, to exercise control over the place of the establishment of a station within its corporate limits. The findings show that the public outside of such corporate limits is not interested in the question. The action is not prosecuted as the statute requires, in the name of and on behalf of the real party in interest.

Code Washington, 1881, page 35, sec. 4.

People *v.* Pacheco, 29 Cal., 210.

High Ex. Leg. Rem., sup., §§ 430–439.

X.

The granting, by the Court, of the thing asked for in the application of the defendant in error, is an encroachment on the legislative power, and is not the exercise of a judicial authority.

A., T. & S. F. R. R. Co. *v.* D. & G. R. R. Co., 110 U. S., 681.

Draper *v.* Notewore, 7 Cal., 276.

XI.

The Court, in rendering judgment on the special findings, is confined to the verdict, and cannot refer to other facts upon the record. Special findings determine the

character of the judgment, and must not only sustain it, but be consistent with it. The verdict is conclusive.

Proff. Jur. Tri., §§ 436, 437, and 439.

Hodges *v.* Easton, 106 U. S., 408.

XII.

All the principal facts necessary to constitute a ground of application must be found by the jury; nothing must be left to presumption or inference, the Court being incompetent to decide disputed facts or settle controverted matters of fact.

Proff. Jur. Tri., § 438.

Board *v.* Grant, 47 Am. Decs., 102.

XIII.

Where a verdict is found against the relator in mandamus proceedings, a peremptory mandamus cannot be granted by the court. Failing to obtain a verdict he is not entitled to a peremptory mandamus.

The People *v.* The Board, etc., 26 N. Y., 316.

High Ex. Leg. Rem., sup., 559.

A judgment, *notwithstanding the verdict*, is not recognized in mandamus proceedings.

XIV.

If the respondent in mandamus proceeding prevails on either of the grounds, or any of the several defences relied upon, the peremptory writ will be refused.

High Ex. Leg. Rem., sup., 560.

It is perfectly plain that the Court below passed on facts not of record, and found facts directly opposite to what the record disclosed, and its opinion was thus made up; and the opinion does injustice to the findings of the jury as heretofore set out (See opinion, Rec., 57

et seq.) And it is also perfectly plain the law, as cited in the eleventh, twelfth, thirteenth, and fourteenth propositions above, condemns this as palpably erroneous.

XV.

Where the petition and pleadings, on which the mandamus is asked, are insufficient and fail to make out a *prima facie* case, the Court will refuse the peremptory writ, notwithstanding the verdict of the jury finding the facts as alleged in the petition.

High Ex. Leg. Rem., sup., 563.
People *v.* Batchellor, 53 N. Y., 128.

This refusal of the Court is like the arresting of judgment in an ordinary action at law.

XVI.

The precise act required of the respondent in mandamus proceedings, as the duty to be performed, must be clearly and definitely specified in the judgment and writ.

High Ex. Leg. Rem., 561, 564, and 539.
State *v.* City of Milwaukee, 22 Wis., 398.
Dill. Mun. Corp., sec. 698.

The thing demanded, and the act directed to be performed, must be made known so as to be definitely ascertained with certainty, not only as to its own character and quality, but also as to the character, time, manner, and locality of its performance.

Mos. Man., 170, and authorities under last proposition.

XVII.

The judgment rendered, directing the issuance of a peremptory writ, ordered that the acts which were therein commanded to be performed should be per-

formed immediately. The writ of mandamus will not issue to compel the performance of an impossible or unreasonable act, or to compel the performance of an act in an impossible or unreasonable manner.

Authorities under the 15th and 16th propositions.

XVIII.

It will be conceded, that wherever the jury have failed to agree upon a question of fact presented to them, that failure to agree must be taken as a declaration, that there was not evidence sufficient to sustain the claim of the defendant in error in relation to that question. Also, it will be conceded, that the failure of the jury to find any of the principal facts necessary to make out the clear legal right of the defendant in error is evidence that such facts did not exist.

The record, then, as we have it, and it is not allowable to go outside of that, presents the simple and naked case of a Court issuing a writ of *mandamus* under the common law, unaided by any statute, directing the railroad company to build a station at a certain point in Yakima City, without reference to the suitableness of the place selected, the cost of maintaining the station at such point, or the business to be transacted thereat, where the jury found that other stations furnished all the facilities the business required, and that the business at Yakima City would not pay the operating expense of a station, much less, the stopping and starting of trains; and that the business was not such as to warrant stations at North Yakima and also at Yakima City; and that there were fifteen times as many people, most of them farmers, located immediately west of North Yakima, who would be much better accommodated by a station at North Yakima than at Yakima City.

To meet this undertaking and as directly against it,

as supplemental to authorities already referred to, we beg to call attention to—

M. & O. R. R. Co. *v.* People, 42 Am. & Eng. R. R. Cas., 671.
State *v.* K. C., &c., 16 *ib.*, 297.
People *v.* Chicago, &c., 35 *ib.*, 462 (decided in Ills. Sup. Ct. June 16, 1889).
People *v.* R. W., &c., R. C. 28 *ib.*, 35.
O. & M. R. R. Co. *v.* People, 30 *ib.*, 509.
People *v.* N. Y. R. Co., 104 N. Y., 58.
People *v.* Board, &c., 107 *ib.*, 235.

Eight of the judges now on this bench will remember the long and animated, not to say heated, discussion we had here, now not quite twelve months since, in the case of the *City of Marshall*, demanding the Texas and Pacific Railway Company be enjoined from removing certain of its property from there and compel it to stay and remain there *permanently*, as it had agreed to do (136 U. S., 393). That was a demand for an injunction; this is a demand for mandamus. It is agreed by all the authorities there are striking points of resemblance between the two. Injunction restrains motion; mandamus sets in motion and compels action. Injunction prevents future injury; mandamus redresses past grievances. Injunction is a conservative remedy; mandamus is an active one.

The same rules of law, however, as to the right to the one or the other prevail. In the case of the *City of Marshall*, sup., it was asked to restrain the railroad from doing certain things, and then to compel it to observe its contract by staying at Marshall as a terminus. Here the railroad is called upon to do certain things at one place, and necessarily to quit doing like things at another place. It is obvious, then, that the principles of law governing the two cases must be the same. The City of Marshall lost her case, with a solemn contract brought

about by the agents of the railroad at that, to stand upon. The Court there adjudged that all these things must be left to the company; they could not be looked after and attended to by the Courts. And where facilities were needed, what kind and how much—in other words, the necessities of trade and commerce—must be left to the company, and cited, with approbation, *Marble Company v. Ripley, 10 Wall., 339–358*, and used the very language of that case, to show how unsuitable it was for the courts to interfere in matters of this kind, unless in a proper case by action at law for damages. With this decision staring us in the face, it were hopeless to ask the Court, it would seem, to restore the fortunes of Yakima City, and build her up again, after she has almost crumbled to pieces and has been nearly floated over to North Yakima. The fourth District Court of Washington might see to and superintend all this work of station and depot building more *judicially* than the railroad company, but it might not do it more *judiciously;* and with that doubt at least before us, it is respectfully submitted, this case be reversed, and this work be withdrawn from that Court and left with the railroad company where its charter places it.

JAMES MCNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff in Error.

SURVEY No 786 CLAIM No 2667

Lot No 20¢
36 81/100 acs

Survey No 766 Claim No 100

Lot No 24¢
25 50

Brooklyn Road

Carlotta

Creek

Bonnevier 10ft Dyke

Dyke

Avenue

Ohio & Mississippi Rail Road Company's Depot Grounds

Alton and St. Louis Rail Road Company's Depot Grounds

St. Louis and South Eastern Rail Way Company's Depot Grounds

Cairo and St. Louis Rail Road Company

Van Glum Dyke

FERRY

DIVISION

Ferry

Depot

Private Wharf (paved levee)

Front Street 60 w.

Second Str. 60 w.

Third Street 60 w.

Fourth Street 60 w.

Fifth Str. 60 w.

Sixth Str. 60 w.

Seventh Str. 60 w.

Eighth Str. 60 w.

Ninth Str. 60 w.

Tenth Str. 60 w.

Eleventh Str. 60 w.

Twelfth Str. 60 w.

Thirteenth Str. 60 w.

Fourteenth Str. 60 w.

Fifteenth Str. 60 w.

Sixteenth Str. 60 w.

Seventeenth Str. 60 w.

Eighteenth Str. 60 w.

Nineteenth Str. 60 w.

Twentieth Str. 60 w.

Twenty First Str. 60 w.

Twenty Second Str. 60 w.

Twenty Third Str. 60 w.

Twenty Fourth Str. 60 w.

Twenty Fifth Str. 60 w.

Twenty Sixth Str. 60 w.

Twenty Seventh Str. 60 w.

Twenty Eighth Str. 60 w.

Twenty Ninth Str. 60 w.

Thirtieth Str. 60 w.

Thirty First Str. 60 w.

Thirty Second Str. 60 w.

Thirty Third Str. 60 w.

Thirty Fourth Str. 60 w.

Thirty Fifth Str. 60 w.

Thirty Sixth Str. 60 w.

Thirty Seventh Str. 60 w.

Thirty Eighth Str. 60 w.

Thirty Ninth Str. 60 w.

Fortieth Str. 60 w.

Forty First Str. 60 w.

Forty Second Str. 60 w.

Forty Third Str. 60 w.

Forty Fourth Str. 60 w.

Forty Fifth Str. 60 w.

Forty Sixth Str. 60 w.

Forty Seventh Str. 60 w.

Forty Eighth Str. 60 w.

Forty Ninth Str. 60 w.

Fiftieth Str. 60 w.

Fifty First Str. 60 w.

Fifty Second Str. 60 w.

Fifty Third Str. 60 w.

Fifty Fourth Str. 60 w.

Fifty Fifth Str. 60 w.

Fifty Sixth Str. 60 w.

Fifty Seventh Str. 60 w.

Fifty Eighth Str. 60 w.

Fifty Ninth Str. 60 w.

Sixtieth Str. 60 w.

Sixty First Str. 60 w.

Sixty Second Str. 60 w.

Sixty Third Str. 60 w.

Sixty Fourth Str. 60 w.

Sixty Fifth Str. 60 w.

Sixty Sixth Str. 60 w.

Sixty Seventh Str. 60 w.

Sixty Eighth Str. 60 w.

Sixty Ninth Str. 60 w.

Seventieth Str. 60 w.

Seventy First Str. 60 w.

Seventy Second Str. 60 w.

Seventy Third Str. 60 w.

Seventy Fourth Str. 60 w.

Seventy Fifth Str. 60 w.

Seventy Sixth Str. 60 w.

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Seventy Eighth Str. 60 w.

Seventy Ninth Str. 60 w.

Eightieth Str. 60 w.

Eighty First Str. 60 w.

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Eighty Third Str. 60 w.

Eighty Fourth Str. 60 w.

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Eighty Sixth Str. 60 w.

Eighty Seventh Str. 60 w.

Eighty Eighth Str. 60 w.

Eighty Ninth Str. 60 w.

Ninetieth Str. 60 w.

Ninety First Str. 60 w.

Ninety Second Str. 60 w.

Ninety Third Str. 60 w.

Ninety Fourth Str. 60 w.

Ninety Fifth Str. 60 w.

Ninety Sixth Str. 60 w.

Ninety Seventh Str. 60 w.

Ninety Eighth Str. 60 w.

Ninety Ninth Str. 60 w.

One Hundredth Str. 60 w.

Lot No 1¢
3 35/100 acs

Intervenor Exhibit E.
May 18 1881
Page 62

The [illegible] Levee Co. } p. 371
The [illegible] R.R. Co. et al }

MISSISSIPPI RIVER

881

SURVEY No 786 CLAIM No 2667

m No 100

Cahokia

Creek

Ohio & Mississippi

Illinois and St. Louis R.R.

Hunnicutt

Dyke

Avenue

Street

Third

Second

Fourth

Front

Church

Levee

Bayou

Ferry

Depot Grounds

Depot Ground ds.

St. Louis and South Eastern Rail Way Company's

Alton and St. Louis Rail Road Co's Grounds

Terre Haute

Cairo and St. Louis Rail Road Company's

DIVISION

Lot No 1?

Private Wharf (paved levee)

Fort St. Louis Caravan Steamb.

Yarghan Dyke

Cahokia Creek

SISSIPPI RIVER

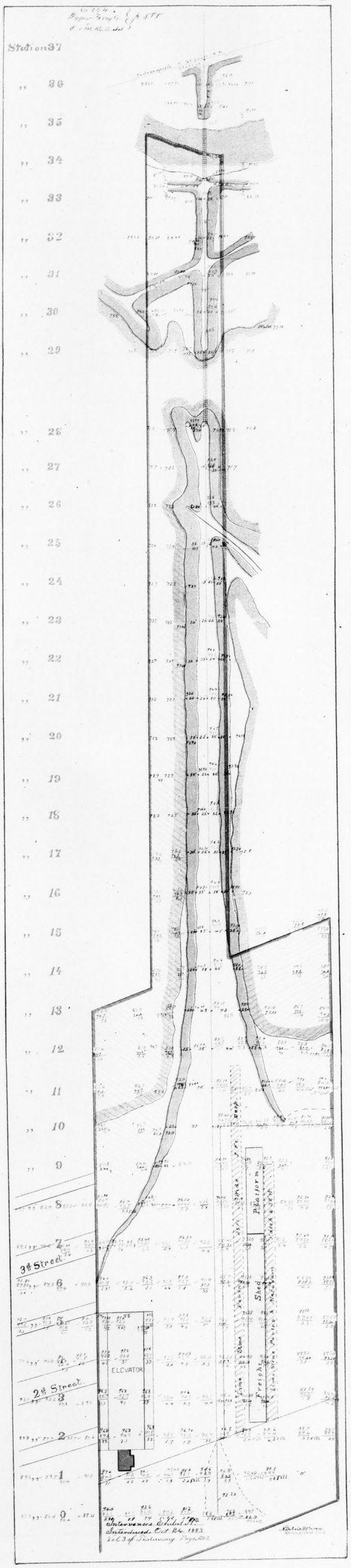
Intervenors Exhibit D
May 10 1881.
Page 3.

No. 264.
The Wiggins Ferry Co
v.
The O & M Ry Co. et al
} p. 880

Mississippi River.

Spring St.
Front Street
Depot Grounds
Toledo Wabash and Western Rail Way Co's
Winter St.
2nd St
3rd St
Company's Old Yard
Ohio and Mississippi R. W. Co's Depot Grounds
(1283.5')
Alton & Chicago Rail Road Co
Depot Grounds
Front Street
Low Water Line
Wiggins Street
2nd St
3rd St
Ohio & Mississippi Rail Way Company's Depot Grounds.

1499'
804
418'6
1223'0"
436'0"
276'4
276'7"
1021'0
718'0
638'6
300'
256'
192'
129'
99'
99'
99

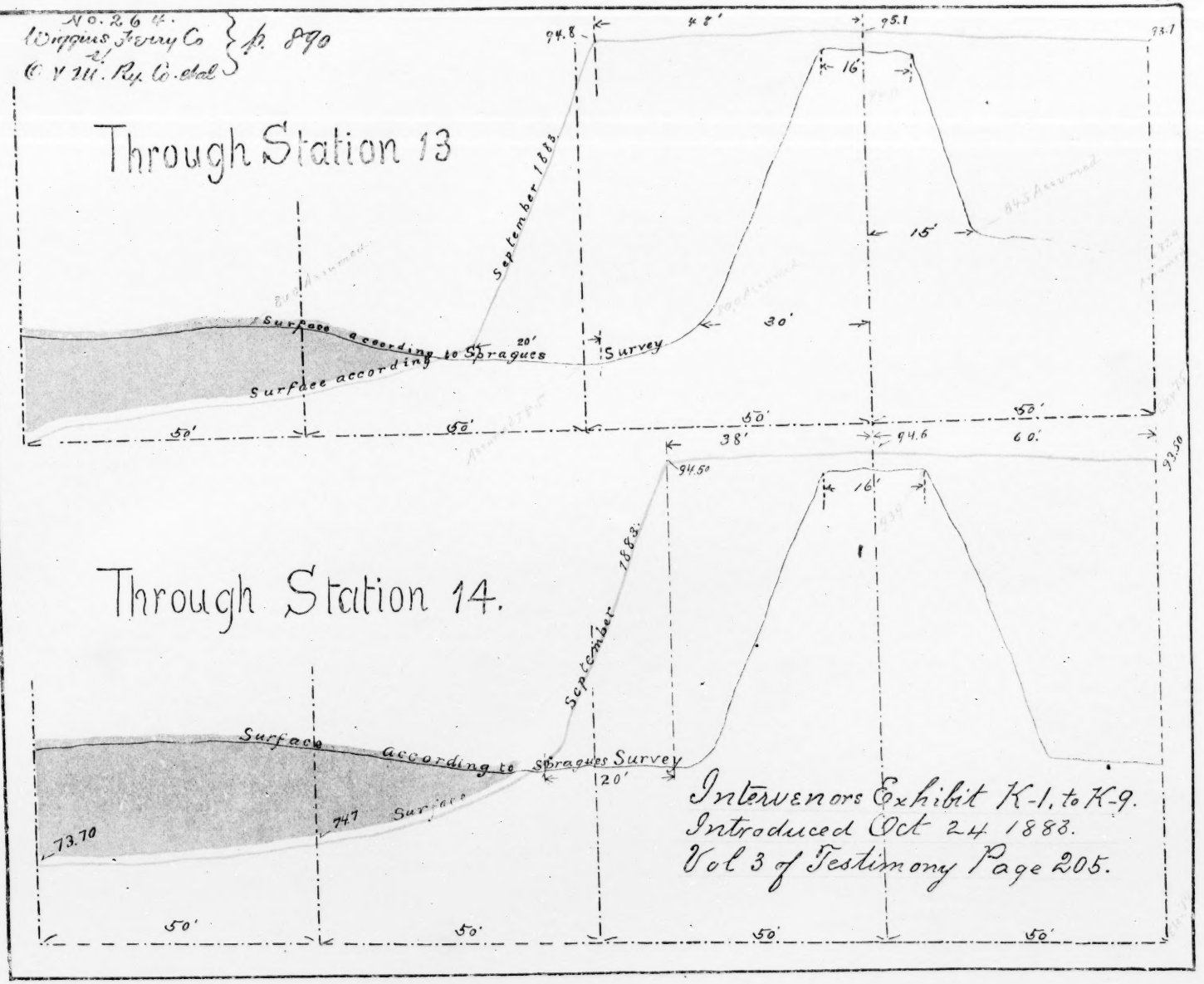

Station 37
" 36
" 35
" 34
" 33
" 32
" 31
" 30
" 29
" 28
" 27
" 26
" 25
" 24
" 23
" 22
" 21
" 20
" 19
" 18
" 17
" 16
" 15
" 14
" 13
" 12
" 11
" 10
" 9
8
7
3d Street
6
5
4
2d Street
3
2
1
0
ELEVATOR
Shed
Shed
Intervenors Exhibit No.
Interstate Com. Com. 1923.
Int. 3 of Testimony Page 883.

Between Sections	Yards of Fill.	Yards of Cut.
0 + 1	73	433
	356	359
	1546	
	2315	
1 + 2	185	
	964	
	453	73
	412	
	1632	
	1620	
2 + 3	917	
	1185	
	491	
	398	
	584	
	500	
	535	
Sta. 2 + 50	2074	
	241	
3 + 4	1232	
	722	
	134	
	570	
	810	
	792	
	693	
Sta. 4 + 50	1919	
	241	
4 + 5	1491	
	991	
	245	
	634	
	898	
	819	
	584	
Sta. 5 + 50	1618	
	241	
5 + 6	1532	
	1315	
	477	
	643	
	783	
	723	
	745	
Sta. 6 + 50	1398	
	241	
6 + 7	1444	
	1352	
	528	
	620	
	833	
	778	
	648	
	694	
	761	
Sta. 7 + 50	241	
7 + 8	1695	
	778	
	870	
	723	
	374	
	491	
	893	
	1083	
	990	
	739	
	120	
8 + 9	1175	242
	829	113
	1306	
	1437	
	452	
	4435	
	132	
9 + 10	602	812
	523	1491
	1398	
	1130	
	411	
	4463	
Carried forward	72849	3683

Between Sections	Yards of Fill	Yards of Cut	
Brot forwd	72849	3683	
10 + 11	98	971	
	1072	530	
	1458	1851	
	878	2361	
	3581	----	
11 + 12	1940	2278	
	1433	1406	
	2874	102	
		2193	
		2565	
12 + 13	1590	3065	
	1648	2111	
	2415	185	
		19441	
		2241	
13 + 14	4926	3352	
Excavation		2843	
		92	
		252	96749
		835	38940
		538	Total Cubic Yards of Fill 57909
		493	from Exhibit A and for
		2705	Filling of Elevator Pit
		882	11489
		60	
			Total filling 46320
In Main Yard	96749	38940	
14 + 15	4048	307	
		935	
15 + 16	3550	185	
		607	
16 + 17	3002	317	
		4541	
17 + 22	9833	1481	
		2778	
22 + 23	1848	785	
23 + 24	1410	904	
24 + 25	1282	961	
25 + 26	3024	509	
26 + 27	4237		
27 + 28	5193		
28 + 29	1486		
	515		
29 + 30	3126		
30 + 31	530	933	
31 + 32	420		East of Main Yard.
32 + 33	337		Cubic yds fill 44062
33 + 34	221		" " cut 11456
			33006
	140811	49996	140811
			49996
			90815
			11489
			79326
Cellar of Elevator			9780
Paving below grade			1709
Total deducted from filling			11489

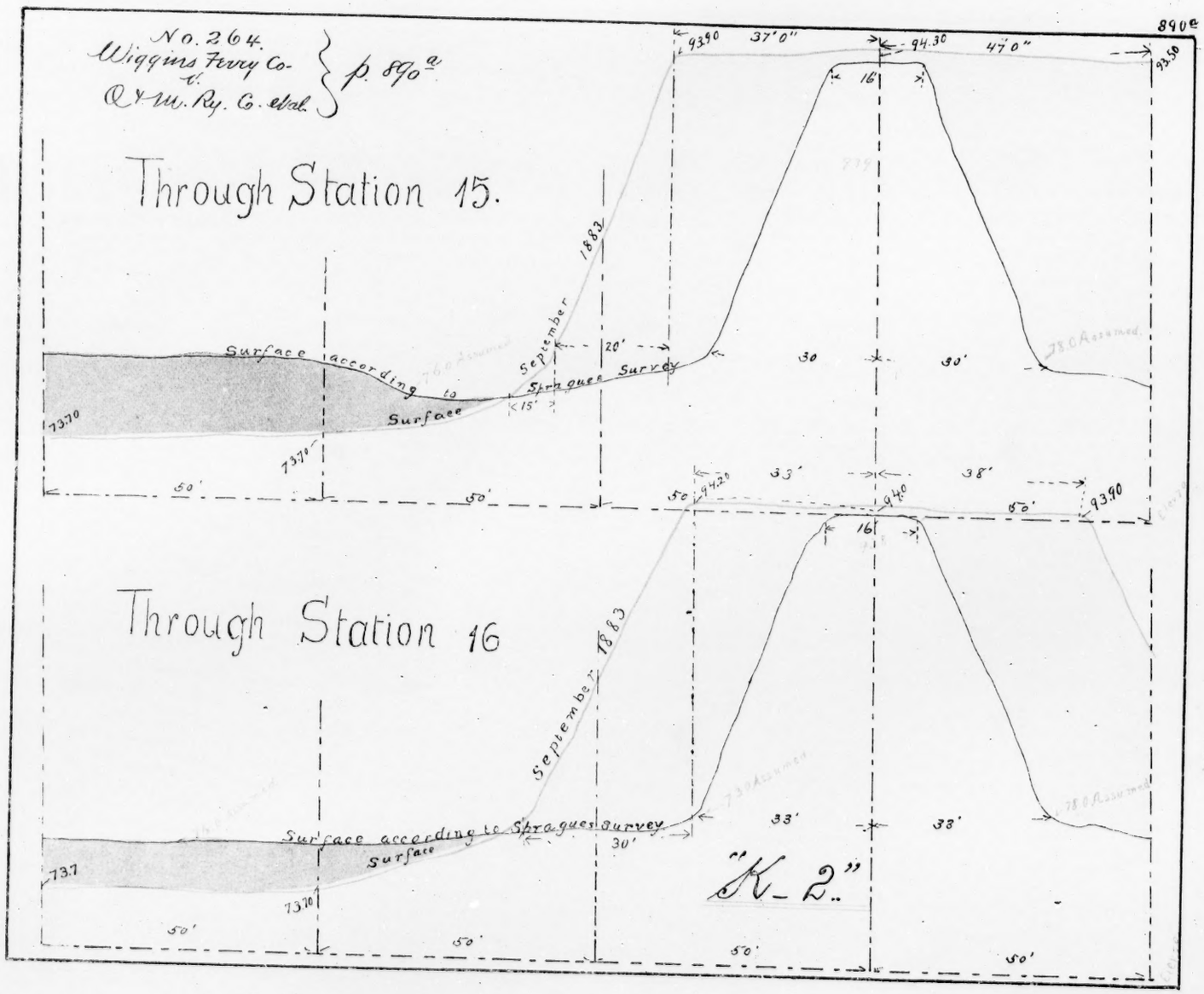
Copy of Interference Exhibit D. Oct. 2d. 1883. Benton Witness Vol 3. Page 204

No. 264.
Wiggins Ferry Co } p. 890
et
C. V. W. Ry. Co. et al }



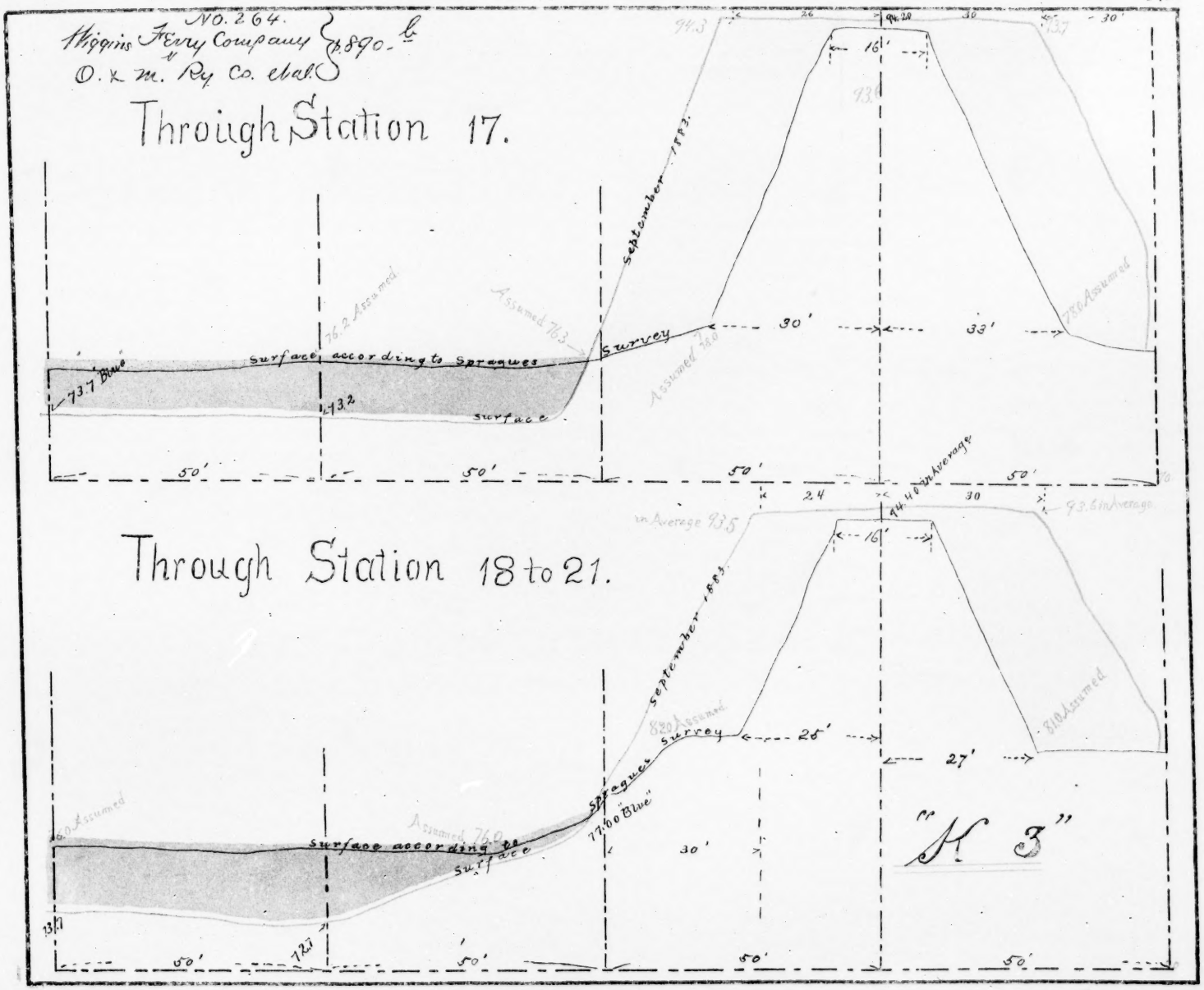
Intervenors Exhibit K-1, to K-9.
Introduced Oct 24 1888.
Vol 3 of Testimony Page 205.

No. 264.
Wiggins Ferry Co.
v.
Q. & M. Ry. Co. et al.
} p. 890a



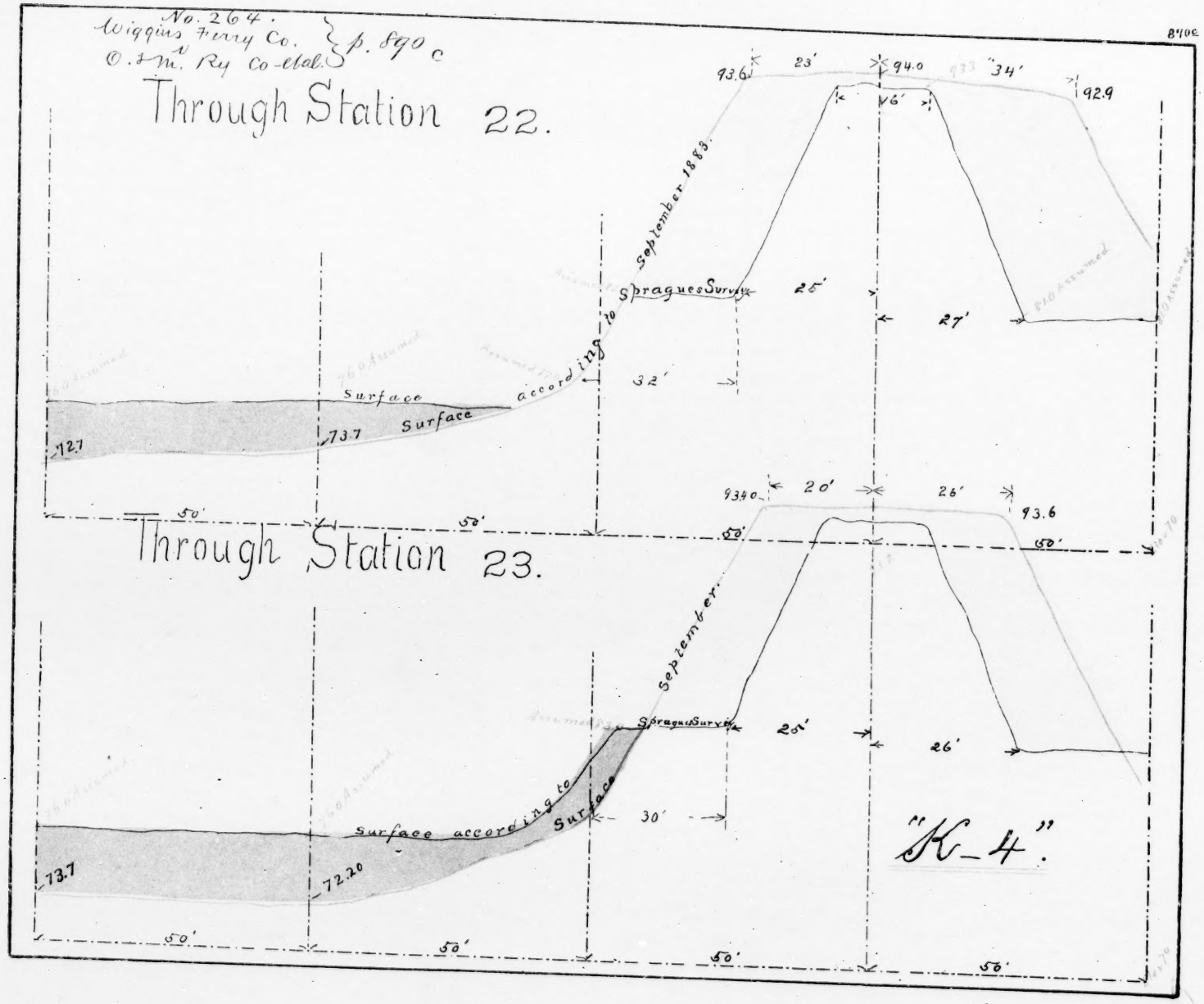
NO. 264.

Wiggins Ferry Company & O. & M. Ry Co. ebal. } $890.- to

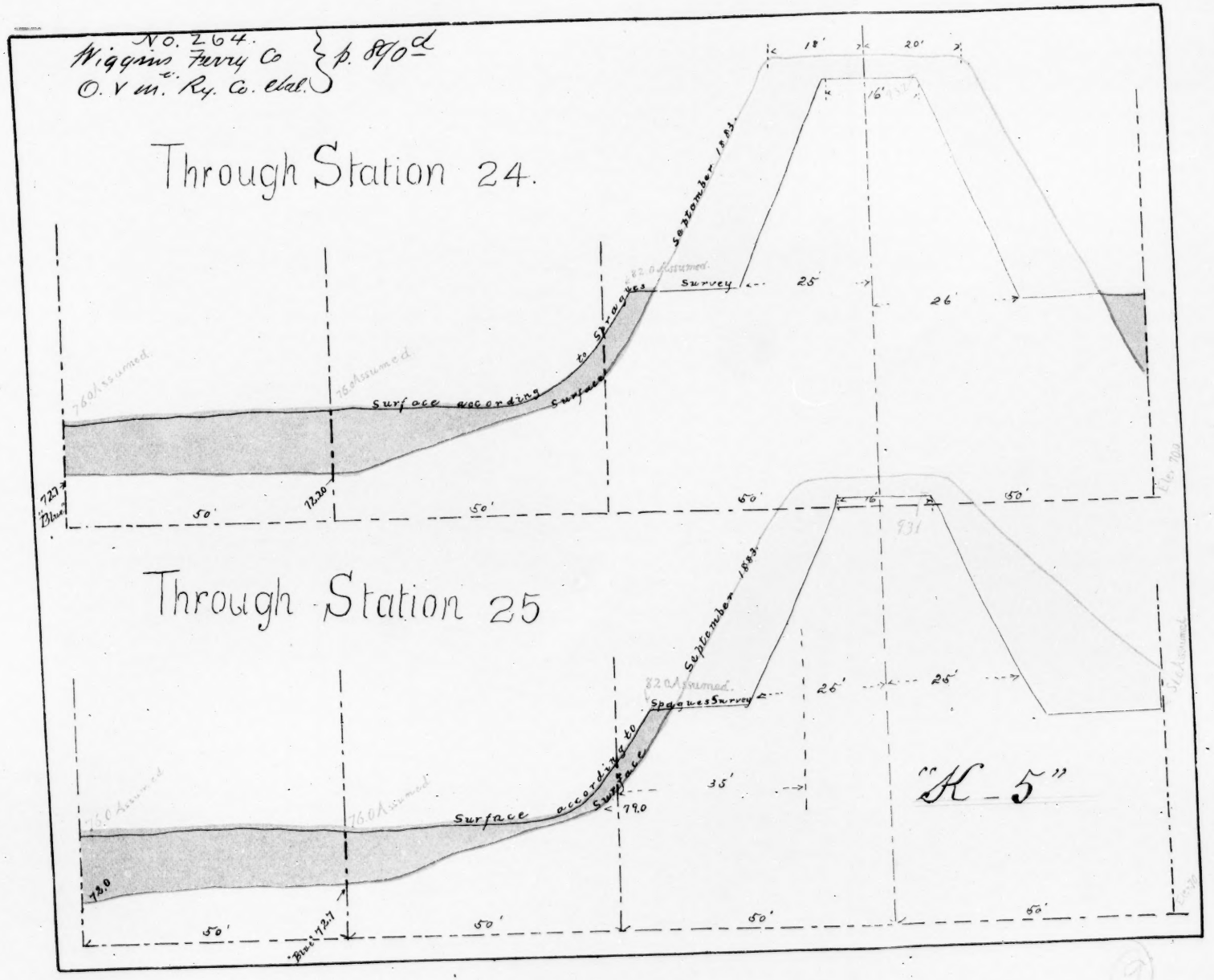


No. 264.
Wiggins Ferry Co. } p. 890 c
O. T. M. Ry Co-Ital.

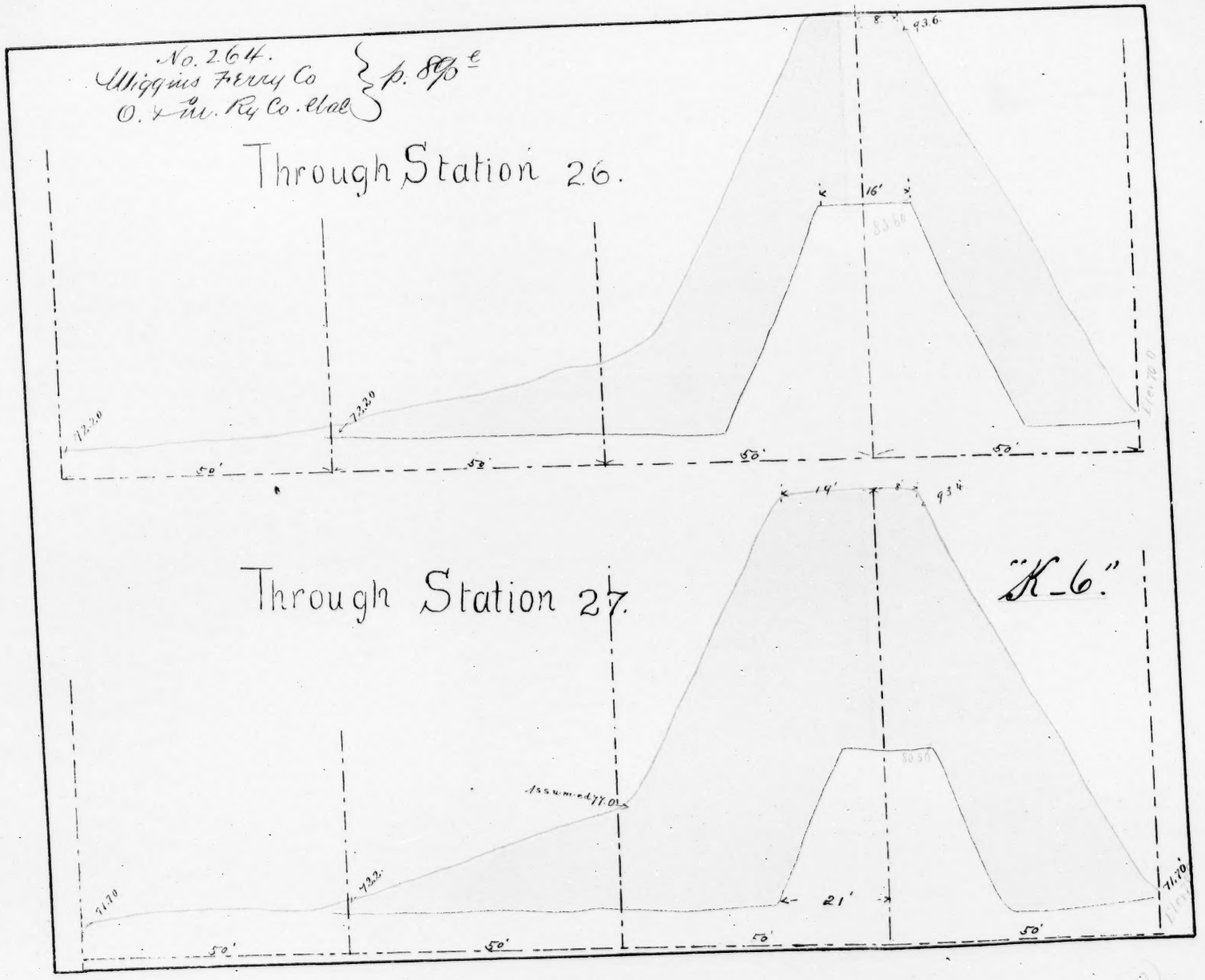
8402

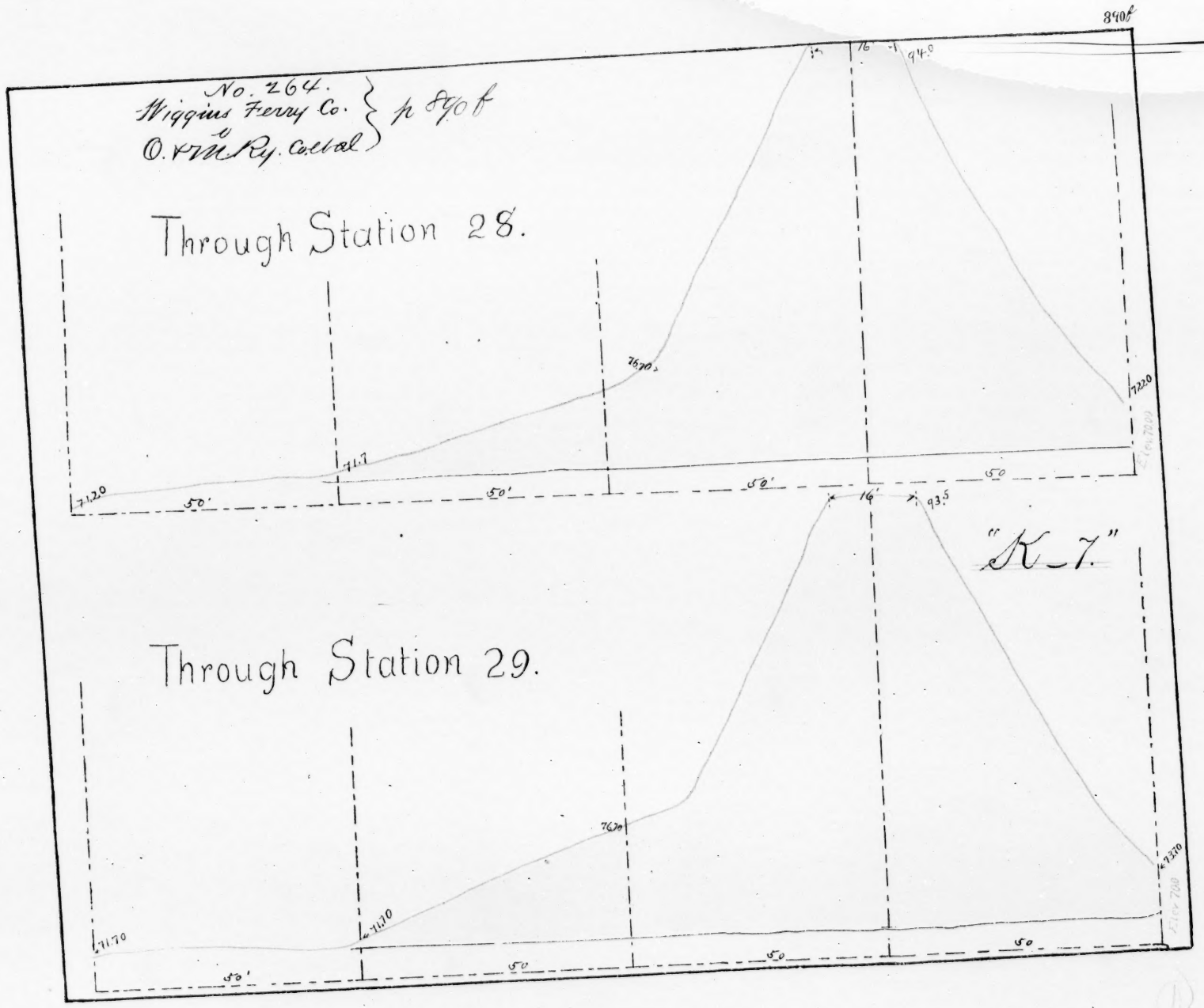


No. 264.
Wiggins Ferry Co } p. 890±
O. V. R. Ry. Co. et al.

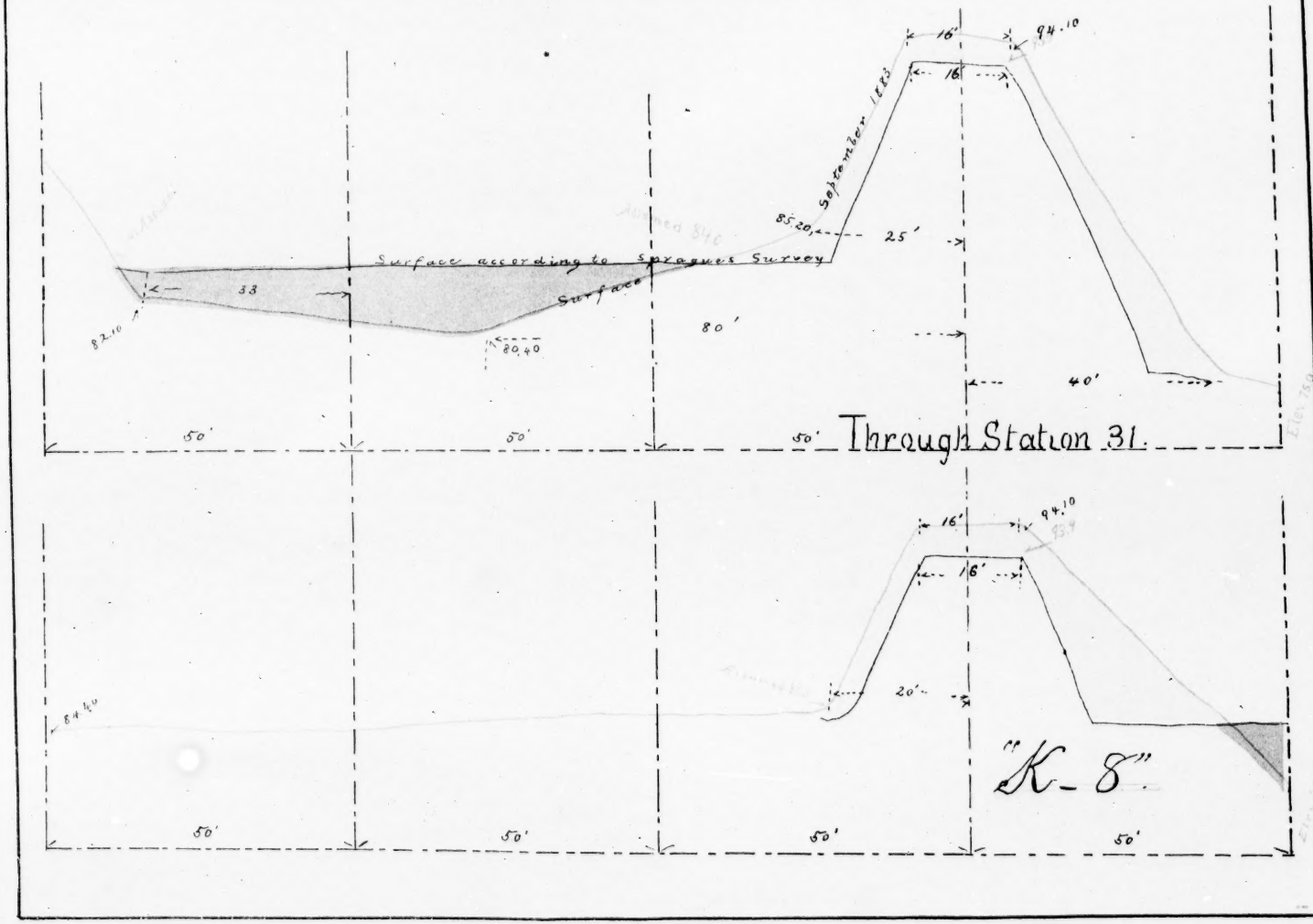


No. 264.
Higgins Ferry Co
O. & M. Ry Co. et al
} p. 890 E




No. 264.
Wiggins Ferry Co. } p 840 f
O. V. & M. Ry. Co. Bdg.
Through Station 28.
76.70
71.7
71.20
50'
50'
50'
50'
16'
93.5
94.0
16
72.20
Elev. 720.0
"K-7."
Through Station 29.
76.70
71.70
71.70
50'
50'
50'
50'
50'
73.70
Elev. 720
840 f

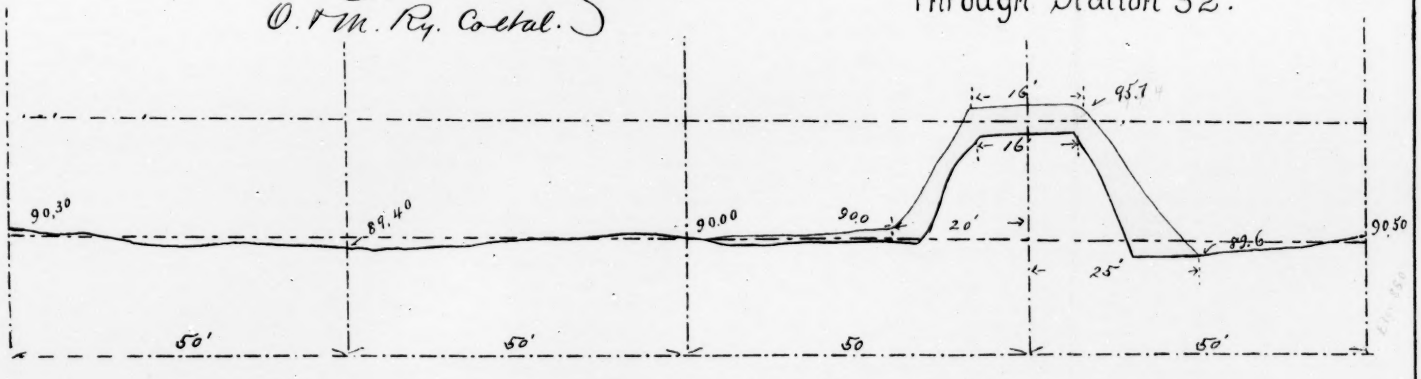
No. 264.
Wiggins Ferry Co.
v.
O. & M. Ry. Co. et al.
} p. 870 I



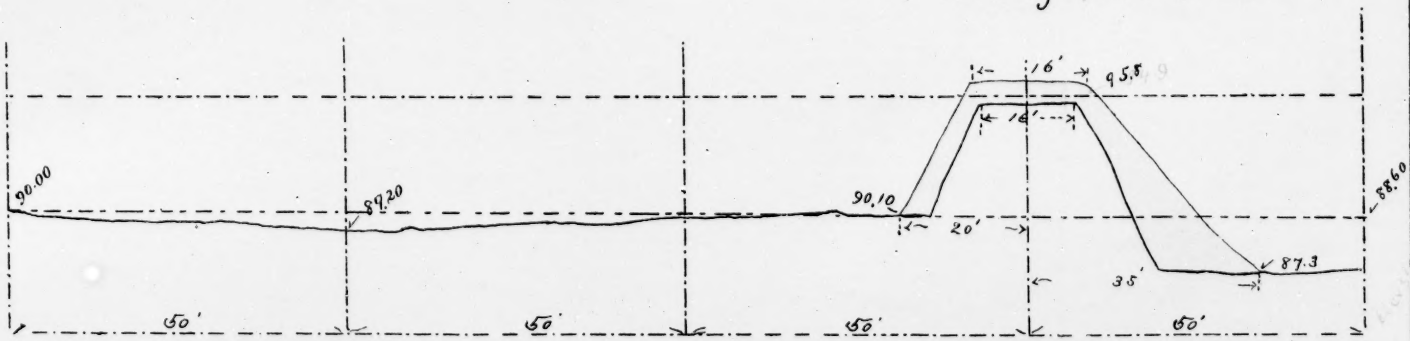
"K-8"

No. 264.
Wiggins Ferry Co. } p. 890 h.
vs.
O. & M. Ry. Co. et al.

Through Station 32.

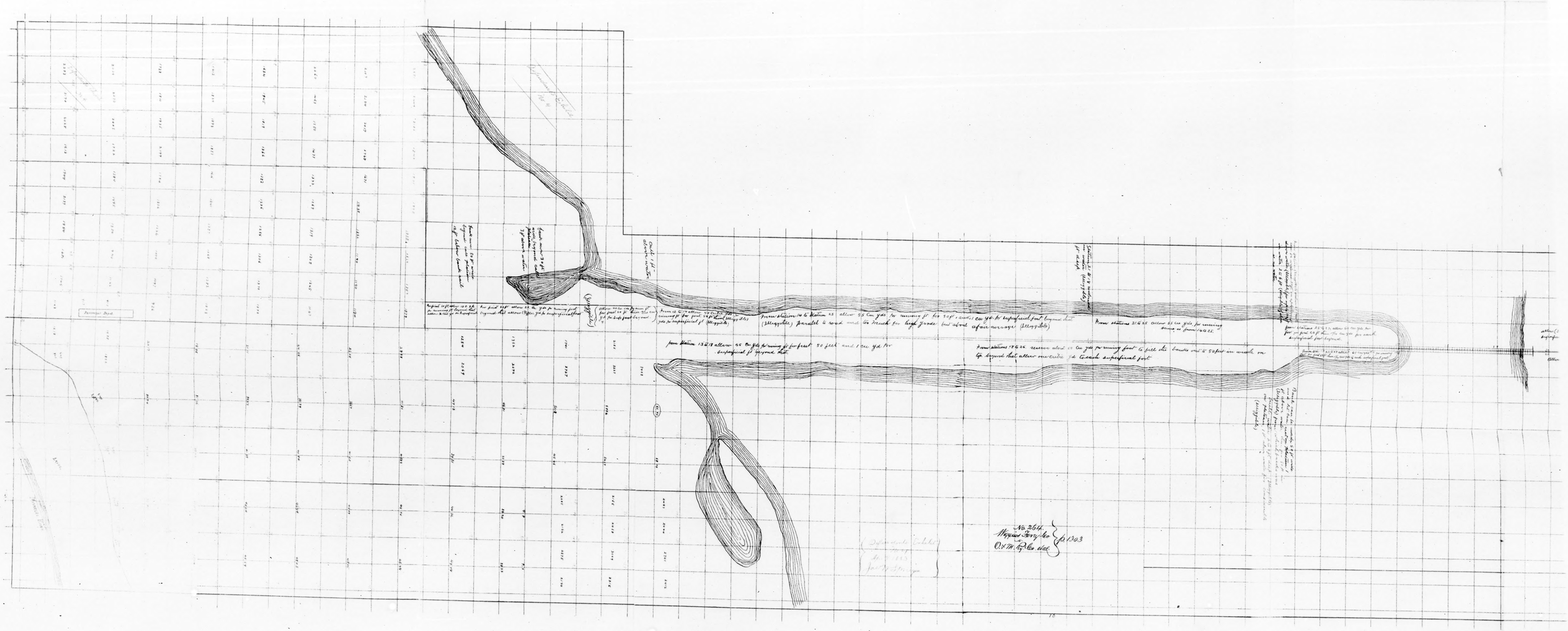


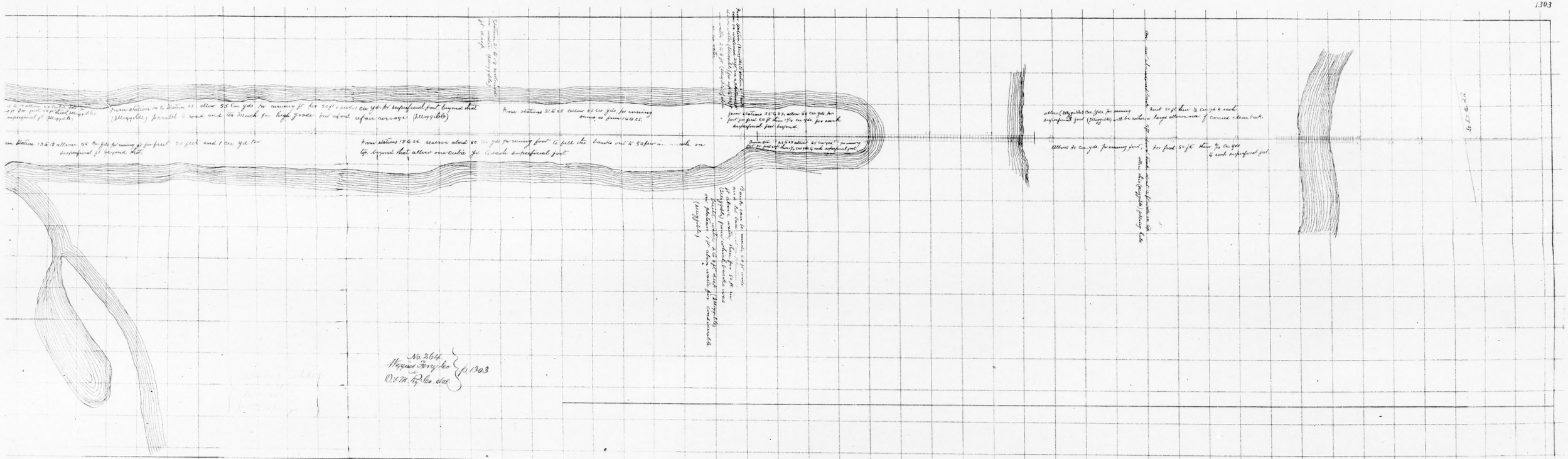
Through Station 33.



"K 9"

(13)


No. 2611
Wayland Township
Ont. Mr. Rly Co. Ltd.
Sp 1303


From station 14 to station 23 allow 55 Cu yds for running ft for 50ft wide (Alleghany) parallel to road and too much for high grade but about a fair average (Alleghany)
From stations 21 & 25 allow 65 cu yds per running same as from 14 to 23.
From stations 25 & 27, allow 60 cu yds for first 50 ft and 1/10 cu yd for each superficial foot beyond.
From station 27 & 29 allow 65 cu yds per running foot for first 50 ft and 1/10 cu yd for each superficial foot.
From stations 18 & 25 excavate about 50 cu yds per running foot to fill the banks and 6 to 8 feet in width on top beyond that allow one cubic yd for each superficial foot
allow (Alleghany) Cu yds for running superficial foot (Alleghany) will be rather a large allowance
Allow 60 cu yds for running foot, first 50 ft then 9/10 Cu yds to each superficial foot.
No 2644 Hayes Ferry Rec'd p. 1303 O & M. Ry Co. Ext.

No. 408.
The Simmons Creek Coal Co. etal
vs
Doran
No. 2

Chrispianus Belcher to Obediah Belcher
226 Acres Feby 13th 1857 DB No 3 pg 37934

Chrispianus Belcher to Mary E Belch
100 Acres Sept 12-1873 D.B. No page 171

Obediah Belcher to Wm Miller 1848 pg. D.B. No

Wm Payne August 1852 D.B No 3 pg 459
W. Scott Witten & N.K. Dangerfield
104 A. 105 P.

Birch at Head of Flipping Cr.

Obediah Belcher from Chrispianus
400 Acres conveyed July 20th 1844 D.B No 2 pg. 216
"Mary E. Barcroft Tract"

Double Birch

Six Chestnuts

N55° E 294 P. Call for 6 Chestnuts

N 55° E 282 P.

N 35° E 114 Poles

N 50° E 106 P.

800 Acres purchased by Robert D. Belcher from Chrispianus Belcher in the year 1844.

Robert D. Belcher from Chrispianus Belcher December 23rd 1852 D.B. No 3 Page 522.

William H Witten from Robert D Belcher 200 Acres- 1853

200 Acres
Chrispianus Belcher to Obediah Belcher
Feby 13th 1857 D.B. No 4 pg 379.
Obediah Belcher to Henry Saddler-
October 25th 1870 D.B. No 7 pg 36.

300 Acres
Chrispianus Belcher to Mary A Belcher
Sept 12th 1873 D.B No 7 pg 433

William Miller & House

2 Pines & Poplar Corner of Wm Miller

String Branch

32 Buckeye

Spruce, Pine, Maple & Buckeye

Mouth of Pine Branch

Spruce

Spruce Pine Branch

2 Buckeyes

Buckeye

Chestnut & Chestnut Oak.

Path 2 WO. & Pob 12

Pum. Spro.

Chestnut Oak

2 Buckeyes

Bell's Branch

Doe Branch

Two Birches.

R D Belcher to Chrispianus Belcher 1848-

Chrispianus Belcher to Henry Walker 640 Acres.
April 12th 1856. D.B. No 4 page 389.

Chrispianus Belcher & others
Deed Book No 3 Page 223

Robert D Belcher & others to Wm H Witten - (1876 No)
100 Acres - December 23rd 1852

North Line of "Taylor K Line"

DUPLET SINGLE POPLAR

Robert D Belcher 1500 Acres

N 10½° W 92½ Poles

Henry D Belcher

Bell lot mostly Laurel

S 35° E 194 Poles

Simmons Creek

BLUESTONE RIVER

Creek

Mouth of Laurel

Property Line

MAP
of
Property owned by
JOSEPH I DORAN & OTHERS

On Simmons Creek & vicinity as shown by old deeds.

Scale; 1000 feet = 1 inch

No. 408.
Simmons Cruck Coal Co Ltd. v. Doran
p. 87.

CHRISPIANOS BELCHER, 1500 ACRES.

N.

Six Chestnuts

N 48° E 24.15 c.

W. O. T 2 Pines.

S 88° 50' E 32.40 c.

2 Pines & W. O.

Simmons Creek Coal Co's property.

N 66½° W. 164 c. to Laurel

Robert D. Belcher 200 Acre Tract Now Jos. I. Doran.

Simmons Creek

2 Birches

Fork of Simmons Creek

East Fork of Simmons Cr.

Ly Brook Line

Double and Single Poplars

Line between R.D. and C. Chrispianos Belcher 1500 Acre Tracts S. 60 W

Scale 10 Chains (40 poles) to 1 in.

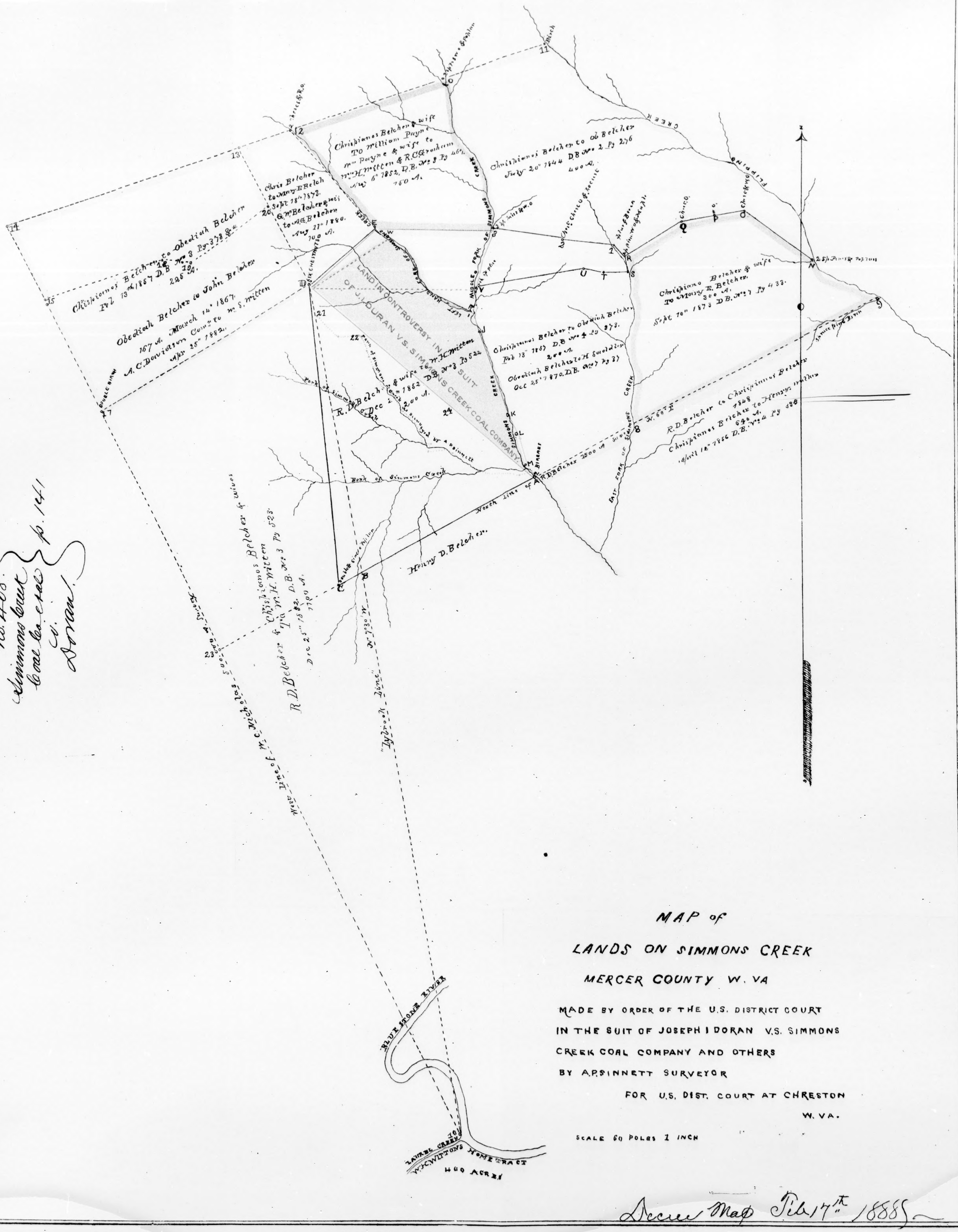
1885.

Wilson Cary Nicholas Line (of 500,000 Acre Tract)

To the mouth of Laurel

To the mouth of Laurel

R. D. BELCHER, 1500 ACRES.


Christianna Belcher & wife To William Payne
Wm Payne & wife to Wm H. Witten & R.C. Graham
May 6th 1852, D.B. No 3 Py 467.
160 A.
Christianna Belcher to Ob Belcher
July 20th 1844 D.B No 2 Py 276
400 A.
Chris Belcher to Mary E Belch
Sept 18th 1873.
C.W. Belcher & wife to W.G. Belcher
Aug 27th 1880.
100 A.
Christianna Belcher to Obediah Belcher
Feb 13th 1857 D.B No 3 Py 378 &c
285 A.
Obediah Belcher to John Belcher
167 A. March 14th 1867.
A.C. Dorrietown Comm'r to W.S. Witten
Apl 25th 1882.
Christianna Belcher & wife
To Mary E. Belcher.
300 A.
Sept 10th 1873 D.B. No 7 Py 433.
Christianna Belcher to Obediah Belcher
Feb 13th 1857 D.B No 4 Py 373.
200 A.
Obediah Belcher to H Goodson
Oct 25th 1870. D.B. No 7 Py 37
R.D. Belcher & wife to W.H. Witten
D.B No 3 Py 522
Dec 2nd 1862
200 A.
R.D. Belcher to Christianna Belcher
1868
Christianna Belcher to Henry D. Belcher
April 12th 1866 D.B. No 4 Py 388
640 A.
Christianna Belcher & wife to Wm C. Nicholas
Dec 25th 1882.
1700 A.
R.D. Belcher & wife to Christianna Belcher
1868
Christianna Belcher to Henry D. Belcher
April 12th 1866 D.B. No 4 Py 388
640 A.
LAND IN CONTROVERSY IN SUIT OF J.J. DORAN V.S. SIMMONS CREEK COAL COMPANY.
Mouth of Simmons Creek
North line of R.D. Belchers 2500 A
East Fork of Simmons Creek
Henry D. Belchers.
"Lydia's Line"
N 79 30' W
West line of Wm C. Nicholas 500 A Survey
23 Surveyed
Bluestone River
Laurel Creek
W.H. Witten's Home Tract
440 Acres
MAP of
LANDS ON SIMMONS CREEK
MERCER COUNTY W. VA
MADE BY ORDER OF THE U.S. DISTRICT COURT
IN THE SUIT OF JOSEPH I DORAN V.S. SIMMONS
CREEK COAL COMPANY AND OTHERS
BY A.P. SINNETT SURVEYOR
FOR U.S. DIST. COURT AT CHRESTON
W. VA.
SCALE 60 POLES 1 INCH
No. 408.
Simmons Creek Coal Co. et al
vs.
Doran.
No. 141
Decree Map Filed 17th 1885

No. 408.
Simmons
Quick Coal Co. et al.
v.
Doran
h 270

Birch.

Chrispianus Belcher to Obediah Belcher
426 Acres Feby 13: 1857 D.B. No. 3 pg 370+4.

Chrispianus Belcher
to
Mary E Belcher
100 acres
Sept 12-1873 D.B. No 8
pg 177-

Wm Payne.
August 7 1853 D.B. No 3 pg 459
A. Scott Hitten & S. McDangerfield
104 A 105 P

Birch.

Obediah Belcher from Chrispianus Belcher
400 Acres Conveyed July 20 1844 D.B. No 2 Pg 26
Mary E Bascroft Tract"

Six Chestnuts

N 30° E/96 P
N 55° E 170 P

N 55° E 384 P Call for 6 Chestnuts
N 29½° E 282 P
N 55° E 414 Poles

Double Birch

Middle Fork of Simmons Creek

West line

200 Acres
Chrispianus Belcher to Obediah Belcher.
Feby 10 1857. D.B. No 4 pg 493.

Obediah Belcher to Henry Maddler.
October 20 1870. D.B. No 7 pg 86.

William Hitten from Robert D Belcher
204 - (202) Acres Deed Book No 3 pg 432.
December 25 1852. D.B. No 3 Belcher

800 Acres purchased by Robert D Belcher from
the heirs in the year 1844

Simmons Creek

S 33° E 21 Poles

N 49° E 24½ Poles

300 Acres.
Chrispianus Belcher to Mary E Belcher.
Sept. 10- 1873. D.B. No 7. pg 433-

2 Pines & Poplar.
Corner of William Miller.

William Miller-

Spruce Pine Branch

Fli Flipping Creek

Spruce Pine Branch

Two Birches

East Fork of Simmons Creek

R D Belcher to Chrispianus Belcher.
1848-

Chrispianus Belcher to Henry Walker 640 Acres-
April 12-1856. D.B. No 4 page 339-

2 Buckeyes

Buckeye Chest. & Chest. Oak.

"Coleman Line"

North Line of Chrispianus Belcher & Others

Robert D. Belcher to
Wm. H. Hitten
100 Acres -
December 23 1852.

Dead Beech No 3 Pogo 223.

Double & Single Poplar.

"Dykes to Line"

Stake in Line

Henry D. Belcher.

Gum & No.

2 Hickory Chest. & Chest. Oak.

Chestnut Oak & 2 Buckeyes

Laurel Creek

Simmons Creek

BLUESTONE RIVER

Mouth of Laurel

Laurel Creek

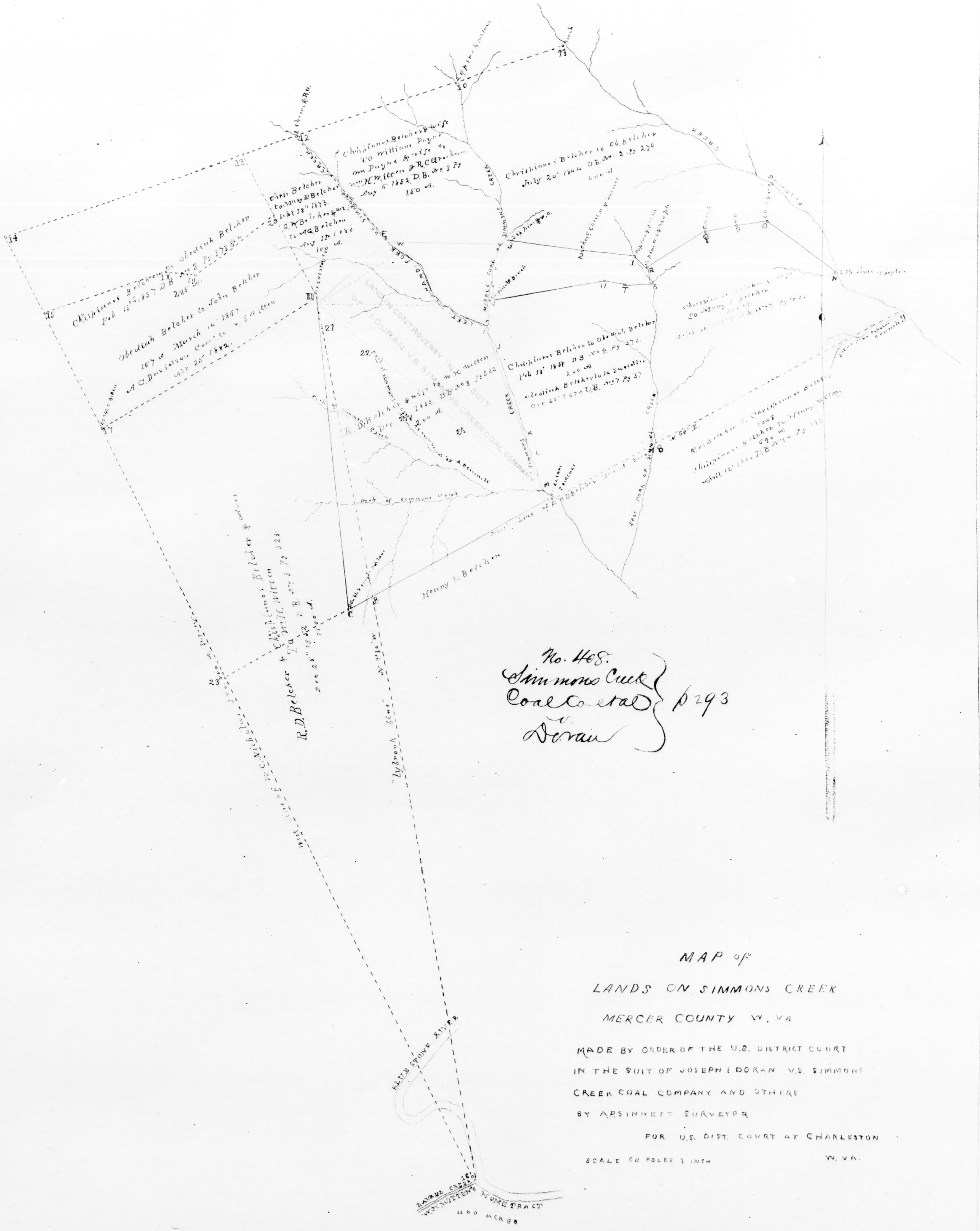
Filed with deposition of
Wm Miller and also
of S. W. Hammack—

MAP of

Lands on the waters of Simmons & Flipping Creeks.

Made from old Deeds.

Property of Joseph D. Doran and others Scale 700' = 1"



MAP of

LANDS ON SIMMONS CREEK

MERCER COUNTY W. VA

MADE BY ORDER OF THE U.S. DISTRICT COURT

IN THE SUIT OF JOSEPH I. DORAN V.S. SIMMONS

CREEK COAL COMPANY AND OTHERS

BY A.R. SINNETT SURVEYOR

FOR U.S. DIST. COURT AT CHARLESTON

W. VA.

SCALE 60 POLES 1 INCH

Decree Map Feby 7th 1888